

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DELAWARE STATE SPORTSMEN'S :
ASSOCIATION, INC., BRIDGEVILLE :
RIFLE & PISTOL CLUB, LTD, :
DELAWARE RIFLE AND PISTOL CLUB, :
DELAWARE ASSOCIATION OF FEDERAL :
FIREARMS LICENSEES, MADONNA M. :
NEDZA, CECIL CURTIS CLEMENTS, :
JAMES E. HOSFELT, JR., BRUCE C. :
SMITH, VICKIE LYNN PRICKETT AND :
FRANK M. NEDZA, :

Plaintiffs, :

C.A. No. 22-951-RGA

v. :

DELAWARE DEPARTMENT OF SAFETY :
AND HOMELAND SECURITY, :
NATHANIEL McQUEEN, JR. in his :
Official capacity as Cabinet :
Secretary, Delaware Department :
Of Safety and Homeland Security; :
and COL. MELISSA ZEBLEY in her :
Official capacity as :
Superintendent of the Delaware :
State Police, :

Defendants. :

- - - - -
GABRIEL GRAY, WILLIAM TAYLOR,)
DJJAMS LLC, FIREARMS POLICY)
COALITION, INC., and SECOND)
AMENDMENT FOUNDATION,)

Plaintiffs,)

C.A. No. 22-1500-MN

v.)

KATHY JENNINGS, Attorney)
General of Delaware,)

Defendants.)

1 J. Caleb Boggs Courthouse
2 844 North King Street
3 Wilmington, Delaware

4 Friday, February 24, 2023
5 9:00 a.m.
6 Oral Argument

7
8 BEFORE: THE HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

9
10 APPEARANCES:

11 LEWIS BRISBOIS BISGAARD & SMITH, LLP
12 BY: FRANCIS G.X. PILEGGI, ESQUIRE

13 -and-

14 GELLERT SCALI BUSENKELL & BROWN, LLC
15 BY: BRADLEY P. LEHMAN, ESQUIRE

16 For the Plaintiffs

17 ROSS ARONSTAM & MORITZ LLP
18 BY: DAVID E. ROSS, ESQUIRE
19 BY: GARRETT MORITZ, ESQUIRE

20 -and-

21 DELAWARE DEPARTMENT OF JUSTICE
22 BY: CANEEL RADINSON-BLASUCCI, ESQUIRE
23 BY: KENNETH WAN, ESQUIRE

24 For the Defendants

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*** PROCEEDINGS ***

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DEPUTY CLERK: All rise. Court is now in
session. The Honorable Richard G. Andrews presiding.

09:01:51 24

THE COURT: All right. Good morning, everyone.

09:01:54 25

Please be seated.

09:01:58 1 All right. So, we have argument at least on the
09:02:03 2 motion for preliminary injunction filed by the Plaintiff in
09:02:06 3 this case, which is *Delaware State Sportsmen's Association*
09:02:12 4 *vs. Delaware Department of Safety and Homeland Security*,
09:02:14 5 Number 22-951.

09:02:18 6 And you are Mr. Lehman or Lehman?

09:02:23 7 MR. LEHMAN: Lehman, Your Honor.

09:02:23 8 THE COURT: All right. And Mr. Pileggi.

09:02:26 9 MR. PILEGGI: Yes, Your Honor.

09:02:27 10 MR. LEHMAN: Yes, Your Honor.

09:02:28 11 THE COURT: And Mr. Moritz, and Mr. Wan and
09:02:33 12 Mr. Ross. And you are, Mr. Ross?

09:02:36 13 MR. ROSS: Yes, Your Honor.

09:02:37 14 THE COURT: And so, who's making argument here,
09:02:39 15 is it Mr. Lehman and Mr. Ross?

09:02:45 16 MR. LEHMAN: Your Honor, if it's all right with
09:02:47 17 the Court, I'm going to handle the assault weapons portion
09:02:49 18 of our argument, along with the injunctive relief factors
09:02:53 19 general, and then Mr. Pileggi was going to handle the
09:02:56 20 magazine issue and the Delaware Constitution issue, if that
09:02:59 21 meets with the Court's approval.

09:03:01 22 THE COURT: Okay. Mr. Ross.

09:03:02 23 MR. ROSS: Your Honor, with the Court's
09:03:03 24 permission, we also plan to split the argument. I was going
09:03:06 25 to discuss some of the factual background as well as the

09:03:09 1 argument as to why large-capacity magazines are not arms.

09:03:13 2 Mr. Moritz will discuss the Second Amendment, and I'll take
09:03:16 3 the remainder of the issues.

09:03:21 4 THE COURT: All right. So, fine.

09:03:22 5 So, I do have maybe just a couple questions that
09:03:25 6 it might be easier for me to just ask before you actually
09:03:28 7 get going. And I guess the first question is for the
09:03:35 8 Plaintiffs.

09:03:35 9 I understand you don't think it's relevant, but
09:03:37 10 for present purposes, I should take every factual assertion
09:03:42 11 that's in the five Defendant declarations as being true;
09:03:45 12 right?

09:03:46 13 MR. LEHMAN: We think if you do, Your Honor,
09:03:48 14 it's not going to make a difference, but --

09:03:50 15 THE COURT: Well, so that's why I said if it's
09:03:52 16 relevant. But if it appears to be relevant, I can take it
09:03:57 17 as true for purposes of the preliminary injunction; right?

09:04:00 18 MR. LEHMAN: Yes.

09:04:01 19 THE COURT: Okay. Thank you.

09:04:03 20 I think this is probably obvious, but when the
09:04:08 21 parties talk about assault rifles and sporting rifles,
09:04:13 22 you're talking about the same thing; right?

09:04:16 23 MR. LEHMAN: From our perspective, Yes, Your
09:04:18 24 Honor. They're the same thing.

09:04:19 25 MR. ROSS: Yes. Yes, Your Honor.

09:04:21 1 THE COURT: Okay. So, are the parties keeping
09:04:25 2 track of similar litigation filed in other states?

09:04:30 3 MR. LEHMAN: Yes, generally, Your Honor. I
09:04:33 4 actually have litigation myself in other states on similar
09:04:36 5 issues.

09:04:36 6 THE COURT: Well, and the reason I ask is
09:04:39 7 because my law clerk provided me with a decision from
09:04:44 8 Illinois about a week ago, and I would imagine you all are
09:04:53 9 familiar with it. And, you know, that seems like the kind
09:04:59 10 of thing that would be useful for me to know about.

09:05:02 11 And so, the only point or the only point is,
09:05:04 12 because I don't actually expect to rule on this motion
09:05:07 13 today, is I would ask that if similar decisions that you
09:05:13 14 think are relevant come down between now and whenever I get
09:05:17 15 a decision out, which hopefully won't be very long, you
09:05:22 16 know, if you could send it to me with a cover letter that is
09:05:26 17 no more than one page, but you know, you can put why it's
09:05:31 18 relevant on the cover page.

09:05:35 19 Can you do that for me?

09:05:37 20 MR. PILEGGI: Yes, Your Honor.

09:05:39 21 MR. ROSS: Yes, Your Honor.

09:05:39 22 THE COURT: Okay. Thank you.

09:05:40 23 All right. And Mr. Ross or Mr. Moritz, if the
09:05:52 24 laws that we're talking about here are constitutional, and
09:05:56 25 particularly the assault weapons one, or HB 450, which is

09:06:06 1 pretty much only prospective, would there be any reason why,
09:06:12 2 if there was the political will for it, Delaware couldn't
09:06:16 3 pass a law basically saying possession of these weapons are
09:06:26 4 criminal and start enforcing that law, you know, maybe with
09:06:31 5 a grace period or something? But is there any reason why
09:06:36 6 the prospective aspect of this makes a difference
09:06:40 7 constitutionally?

09:06:41 8 MR. ROSS: Not from a Second Amendment
09:06:44 9 perspective as we see it, Your Honor.

09:06:46 10 THE COURT: Okay. Thank you.

09:06:49 11 And I guess the other question I had was, you
09:07:00 12 know, you're in federal court, and part of this is arguing
09:07:02 13 about Delaware Constitution and the Delaware Supreme Court,
09:07:09 14 and the Delaware analog to the Second Amendment, which is
09:07:13 15 different for sure or different, I think, than the Second
09:07:21 16 Amendment.

09:07:21 17 And I'm just kind of wondering: Have either of
09:07:27 18 you, either side, thought about certifying a question, you
09:07:33 19 know, maybe whether or not these statutes are facially
09:07:38 20 unconstitutional under the Delaware Constitution to the
09:07:41 21 Delaware Supreme Court or something like that?

09:07:45 22 MR. PILEGGI: Your Honor, can I address that?

09:07:47 23 THE COURT: Yes.

09:07:47 24 MR. PILEGGI: Your Honor, that's something that
09:07:50 25 we did think about and might ultimately do, but based on

09:07:55 1 Bruen, we didn't think that was necessary based on the two
09:07:58 2 Delaware Supreme Court decisions that have interpreted
09:08:02 3 Article I Section 20. We didn't think it was necessary.
09:08:04 4 But you may know the history of one of those Delaware
09:08:08 5 Supreme Court's decisions in *Doe vs. Wilmington Housing*
09:08:09 6 *Authority*, we actually start out in this court. We went to
09:08:11 7 the Third Circuit. And then when we were in the Third
09:08:13 8 Circuit, we asked the Third Circuit to certify a question to
09:08:16 9 the Delaware Supreme Court on that Delaware Constitutional
09:08:19 10 issue, which they did. And that's how we got the *Doe vs.*
09:08:23 11 *Wilmington Housing Authority* decision.

09:08:25 12 So, the short answer to your question, Your
09:08:27 13 Honor -- I'm happy to give a longer answer. The short
09:08:29 14 answer is we don't think there's enough ambiguity for that
09:08:31 15 to be necessary. But if the Court thinks it's helpful,
09:08:34 16 we're certainly open to it.

09:08:35 17 THE COURT: All right. Thank you, Mr. Pileggi.
09:08:38 18 That's very helpful.

09:08:39 19 Any comment on your side?

09:08:40 20 MR. ROSS: We basically wound up exactly where
09:08:43 21 Mr. Pileggi ended, Your Honor, which is we don't think it's
09:08:45 22 necessary, but obviously, we would defer to the Court.

09:08:49 23 THE COURT: Okay. So, on that issue, I would
09:09:03 24 like the parties to meet and confer and submit a -- you
09:09:22 25 know, as you all know better than me, there's a procedure

09:09:25 1 you have to go through to make it the kind of question you
09:09:32 2 can't actually certify. Obviously, Mr. Pileggi has done it
09:09:35 3 before, but I would like you to try to propose to me -- you
09:09:46 4 don't have to say, We want to do it, but assume that I want
09:09:51 5 to do it and propose something hopefully that you could
09:09:57 6 agree upon. But if not, separately as to what I would need
09:10:04 7 to do in order to make such a certification.

09:10:15 8 You know, I have seen the Third Circuit in a
09:10:19 9 different case of mine certify a question to the Delaware
09:10:24 10 Supreme Court, but, in some ways, it seems to me like if
09:10:28 11 you've got that sort of issue, maybe it's better to do it
09:10:31 12 sooner rather than later. So, maybe if I could ask if you
09:10:39 13 could submit something by a week from Monday.

09:10:50 14 Okay. Thank you.

09:10:51 15 And I guess I have two other questions. One of
09:10:59 16 which is: In terms of what the difference is between an
09:11:08 17 assault pistol and a semi-automatic pistol like a Glock 9
09:11:14 18 millimeter, maybe I read over that part of the declarations
09:11:20 19 too quickly or something.

09:11:22 20 Is there a real short and simple answer of what
09:11:24 21 the difference is?

09:11:26 22 MR. LEHMAN: Our answer, Your Honor, would be
09:11:27 23 there's no material difference at all other than cosmetic
09:11:30 24 features. They all function the same.

09:11:33 25 THE COURT: Okay. No difference.

09:11:36 1 And you, sir?

09:11:37 2 MR. ROSS: Your Honor, we believe there are
09:11:39 3 fundamental differences. I won't get into the details --

09:11:42 4 THE COURT: No, save me the -- give me the short
09:11:44 5 answer.

09:11:45 6 MR. ROSS: So, we believe there are significant
09:11:47 7 fundamental differences. The assault pistols, among other
09:11:53 8 things, are derived from weapons of war, some machine guns.
09:11:58 9 I want to be very clear that the 9 millimeter, like a Glock,
09:12:02 10 is not covered by the statute, and there's no suggestion
09:12:05 11 that it is.

09:12:06 12 THE COURT: No, I understand that, but, or I
09:12:09 13 wasn't suggesting it was. I was trying to figure out how
09:12:13 14 much of a difference there was. And just, you know, you
09:12:19 15 could derive something from a military weapon and get to an
09:12:25 16 end result. And you could derive something from other some
09:12:29 17 other source and get to a pretty similar end result, because
09:12:34 18 it seems like it shouldn't really matter what the -- if you
09:12:41 19 get to the same result, it shouldn't matter, you know, what
09:12:44 20 the idea was 70 years ago.

09:12:48 21 Right?

09:12:48 22 MR. ROSS: No, that's right, Your Honor. And I
09:12:51 23 should be more clear that beyond sort of a derivation, it's
09:12:56 24 they share commonality of features. It's not -- you know,
09:12:57 25 you could start from two different points and wind up in two

09:13:00 1 very different places. I take Your Honor's point well, but
09:13:02 2 we believe that banned assault pistols share a number of
09:13:07 3 features that are commonly found.

09:13:08 4 THE COURT: And so, one of them, if I'm correct,
09:13:11 5 is what's called the shroud which is something that sticks
09:13:14 6 off; is that right or is that wrong?

09:13:18 7 MR. ROSS: Yes, Your Honor.

09:13:19 8 THE COURT: And the shroud is a little thing
09:13:21 9 that extends from the end of the barrel, so that, according
09:13:26 10 to the expert, when you bump into something, you don't hurt
09:13:29 11 the gun or, I'm not saying that right, but generally along
09:13:33 12 that gist; right?

09:13:33 13 MR. ROSS: It's my understanding, Your Honor.

09:13:35 14 THE COURT: But in terms of the sort of firing
09:13:41 15 function, is it pretty much the same?

09:13:44 16 MR. ROSS: We'll get into this, Your Honor, but
09:13:47 17 there are actually significant differences with some of
09:13:50 18 these weapons, including velocity at which the bullets are
09:13:54 19 fired, which we will get to, that has a significant impact
09:13:57 20 on the destructive ability of the weapons, Your Honor.

09:14:00 21 THE COURT: Okay. So, for purposes of today's
09:14:13 22 proceeding, I would have said the briefing was -- maybe
09:14:33 23 that's not a fair characterization. I guess I would say to
09:14:39 24 the Plaintiffs, it seemed to me your position is none of
09:14:44 25 these things really matter in terms of the number of

09:14:49 1 different guns that are listed for Second Amendment
09:14:53 2 purposes, the number of different guns that are listed, even
09:14:56 3 the definition of copycat, and is that right or am I wrong
09:15:02 4 there?

09:15:03 5 MR. LEHMAN: If I understand you correctly, Your
09:15:06 6 Honor, I think that's right. What the State has done is
09:15:09 7 taken semi-automatic weapons generally and said basically
09:15:13 8 these have features that we think are scary. And so, this
09:15:19 9 smaller subset of semi-automatic firearms are banned now.
09:15:24 10 The list really doesn't make any difference.

09:15:27 11 THE COURT: Okay. All right. So, thank you.

09:15:31 12 So, Mr. Lehman or Mr. Pileggi, whoever was going
09:15:36 13 first, why don't you go ahead.

09:15:40 14 MR. LEHMAN: Good morning, Your Honor. May it
09:15:43 15 please the Court, Bradley Lehman of Gellert Scali Busenkell
09:15:46 16 and Brown on behalf of the Plaintiffs from the now
09:15:48 17 consolidated Gray matter.

09:15:51 18 So, Your Honor, I'll just kind of proceed
09:15:53 19 through the injunctive relief elements and hit kind of major
09:15:56 20 points rather than rehashing all of the briefing.

09:15:59 21 THE COURT: Well, yeah, so rehashing is not very
09:16:02 22 helpful.

09:16:02 23 MR. LEHMAN: Right.

09:16:02 24 THE COURT: And, I guess, to some extent, the
09:16:04 25 injunction, the points about irreparable harm, public

09:16:10 1 interest, burden, you know, relative burden, I wouldn't be
09:16:15 2 spending a lot of time on that. I mean, the thing that's of
09:16:17 3 interest, and it's difficult, to me at least, is the Second
09:16:23 4 Amendment issues.

09:16:23 5 MR. LEHMAN: Sure. So, I'll certainly focus my
09:16:25 6 time on that, Your Honor.

09:16:26 7 So, under *Bruen*, Your Honor, the Court has to
09:16:28 8 determine whether the arms at issue are protected by the
09:16:32 9 Second Amendments or what they call the unqualified. And
09:16:34 10 unquestionably in this case, they are. These are bearable
09:16:38 11 arms, first of all. And in addition to being bearable arms,
09:16:41 12 they're in common use for lawful purposes today.

09:16:44 13 THE COURT: Well, so you say "in common use for
09:16:46 14 lawful purposes." I counted up something like ten times in
09:16:50 15 *Bruen* where they said in common use for self-defense.

09:16:55 16 MR. LEHMAN: Right. So, the difference, Your
09:16:57 17 Honor, and in *Heller* and in many other cases, they referred
09:17:00 18 to lawful purposes. In *Bruen* in particular, the issue was
09:17:03 19 in New York should people be able to get -- you know, do you
09:17:08 20 need to show some heightened standard of need in order to
09:17:11 21 have a concealed carry handgun.

09:17:14 22 And so, naturally the Court's discussion in that
09:17:17 23 case was about people's right to arm self-defense outside of
09:17:20 24 their homes because concealed carry handguns don't have a --
09:17:25 25 you don't carry a concealed handgun for a recreational or

09:17:28 1 hunting purpose. So, that was the focus there.

09:17:31 2 But the focus in other cases has been on lawful
09:17:34 3 purposes. And the Court has recognized that there are other
09:17:38 4 lawful purposes like hunting, or like recreational target
09:17:41 5 shooting or competitive target shooting, a variety of things
09:17:45 6 that can also constitute lawful use if you're not using it
09:17:49 7 to commit crimes. Then, whatever else you're doing with it
09:17:51 8 is a lawful use.

09:17:53 9 And what the State did in that case was sort of
09:17:57 10 changed the test in two ways. One of those ways --

09:18:00 11 THE COURT: Well, so actually before you get to
09:18:02 12 the test --

09:18:03 13 MR. LEHMAN: Sure.

09:18:04 14 THE COURT: -- you said these are bearable arms.
09:18:09 15 And I'm just curious: Knives are bearable arms, too; right?

09:18:16 16 MR. LEHMAN: Yeah, I think the definition of
09:18:18 17 bearable arms goes back quite a long way to -- I'm not going
09:18:22 18 to be able to -- I'm paraphrasing, but anything that you
09:18:25 19 might pick up and use, you know, in defense of yourself.

09:18:29 20 THE COURT: So, bearable arms, Bowie knives,
09:18:32 21 switchblades, these are all bearable arms?

09:18:34 22 MR. LEHMAN: Well, the distinction with those
09:18:37 23 items was that they were perceived at the time --

09:18:39 24 THE COURT: Well, so are they bearable arms or
09:18:43 25 not?

09:18:43 1 MR. LEHMAN: Yes. Yes, there's more to the test
09:18:44 2 than just being bearable arms, of course. I mean, machine
09:18:47 3 guns are bearable arms and rocket launchers are bearable
09:18:50 4 arms.

09:18:50 5 THE COURT: Tasers are bearable arms; right?

09:18:53 6 MR. LEHMAN: Yes.

09:18:54 7 THE COURT: Pepper spray?

09:18:55 8 MR. LEHMAN: Yes.

09:18:55 9 THE COURT: And you said machine guns?

09:18:58 10 MR. LEHMAN: Right.

09:18:59 11 THE COURT: Sawed-off shotguns are bearable
09:19:01 12 arms?

09:19:01 13 MR. LEHMAN: Right. All those things are
09:19:02 14 bearable arms.

09:19:03 15 THE COURT: A bazooka would be a bearable arm?

09:19:05 16 MR. LEHMAN: Absolutely. So, then you move on
09:19:07 17 to whether it's dangerous and unusual.

09:19:08 18 THE COURT: Do you think a silencer is a
09:19:10 19 bearable arm?

09:19:11 20 MR. LEHMAN: I don't know whether you would
09:19:12 21 characterize that itself as an arm. Certainly, as part of a
09:19:17 22 firearm, it serves a purpose.

09:19:21 23 THE COURT: Okay. All right. So, go ahead.

09:19:23 24 MR. LEHMAN: So, as Your Honor was just sort of
09:19:26 25 keying in on, the next step, obviously, is that not all

09:19:30 1 bearable arms are protected. They're presumptively
09:19:33 2 protected, but then they move on to determine whether
09:19:36 3 they're dangerous and unusual. You know, the State has some
09:19:40 4 focus about, Well, we need to conduct all this historical
09:19:43 5 analysis. But if you read *Bruen*, the Supreme Court has done
09:19:46 6 the historical analysis when it comes to banning firearms
09:19:49 7 themselves.

09:19:50 8 Certainly, historical analysis can be useful in
09:19:53 9 analyzing other sorts of firearm regulations. That's such
09:19:57 10 as what's going on right now in New Jersey with the
09:19:59 11 sensitive place restrictions. You know, what sorts of
09:20:02 12 places can you bring your concealed handgun, those sorts of
09:20:06 13 things.

09:20:07 14 THE COURT: And so, if you refer to what's going
09:20:09 15 on in other states, I have no knowledge of what's going on
09:20:11 16 in other states.

09:20:12 17 MR. LEHMAN: So, New Jersey, in response to
09:20:14 18 *Bruen* passed a law saying, Okay, we're abandoning our
09:20:17 19 justifiable needs standard, because that's unconstitutional.
09:20:20 20 So, instead, everyone gets a license, but you can't really
09:20:22 21 carry anywhere. So, that's their short-term solution to
09:20:26 22 that, which is being challenged now.

09:20:28 23 And so, in the context of those sorts of
09:20:30 24 regulations, we might look back through history and say,
09:20:33 25 Okay, well, around the time of the founding and shortly

09:20:35 1 thereafter, were people carrying guns into churches, and
09:20:38 2 schools and things like that? And so, that sort of analysis
09:20:41 3 would be helpful.

09:20:42 4 But in the context of banning arms themselves,
09:20:45 5 the Supreme Court has already undertaken that analysis and
09:20:48 6 concluded that if you look back through the relevant
09:20:51 7 history, what's important is bearable arms can only be
09:20:56 8 banned if they're dangerous and unusual. And naturally, as,
09:21:01 9 you know, Your Honor was sort of keying in upon, talking
09:21:03 10 about, you know, other sorts of bearable arms that are not
09:21:08 11 protected. The question is not whether they're dangerous,
09:21:11 12 because any weapon or anything that you might use to defend
09:21:13 13 yourself has to be dangerous or it would be useless for that
09:21:17 14 purpose.

09:21:17 15 THE COURT: So, the dangerous part of dangerous
09:21:20 16 and unusual or even dangerous or unusual, but the dangerous
09:21:24 17 part, how does that relate because the definition of arms
09:21:32 18 that you've, I think, cited, essentially all arms are
09:21:38 19 dangerous. That's the point.

09:21:40 20 MR. LEHMAN: Right.

09:21:40 21 THE COURT: How would you distinguish one arm
09:21:44 22 from another in terms of dangerousness?

09:21:47 23 MR. LEHMAN: It's not important that we do,
09:21:51 24 because the question and the distinction drawn in *Bruen* is
09:21:56 25 whether or not an arm is highly unusual in society at large.

09:22:00 1 So --

09:22:01 2 THE COURT: So, when they talk about dangerous
09:22:02 3 and unusual, the dangerous is just kind of redundant?

09:22:05 4 MR. LEHMAN: I think that in the context of the
09:22:09 5 discussion of weapons, of course the dangerous part goes
09:22:13 6 without saying because, you know, no one keeps a bag of
09:22:16 7 marshmallows by their nightstand in case a burglar breaks
09:22:19 8 in. You want to have something that would conceivably cause
09:22:22 9 injury to somebody if it was necessary to defend yourself in
09:22:25 10 that way. So, *Bruen's* true distinction said, Well, if
09:22:28 11 they're highly unusual in society at large, then they're
09:22:33 12 outside of that test. They meet the dangerous and unusual
09:22:37 13 test essentially at that point.

09:22:40 14 THE COURT: So, the highly unusual, is that a
09:22:45 15 different way of saying not in common use?

09:22:48 16 MR. LEHMAN: I think that it's essentially the
09:22:50 17 same. You know, if something is not in common use, it's
09:22:54 18 unusual enough that it's not protected.

09:22:58 19 THE COURT: Well, so does the Supreme Court in
09:23:00 20 *Bruen* or anywhere else, for that matter, give any kind of
09:23:05 21 explanation of what is in common use and what is not in
09:23:10 22 common use? I mean, I think if you said, Are televisions in
09:23:16 23 common use, everyone would say, Yeah, agree with that.

09:23:20 24 If you said are Teslas in common use? I don't
09:23:25 25 know.

09:23:28 1 MR. LEHMAN: Well, driving around Delaware, I
09:23:29 2 think it's safe to they are. But, no, the Supreme Court
09:23:34 3 doesn't give us an absolute number or a fraction of a total
09:23:37 4 of anything and say, Beyond this threshold, you've hit
09:23:40 5 common use.

09:23:41 6 THE COURT: And, of course, they didn't have to
09:23:43 7 because I think one could take judicial notice that handguns
09:23:48 8 are in common use. You've got your statistical. There's
09:23:51 9 400 million, give or take some amount, or at least that's
09:23:57 10 the number that sticks in my head of firearms in the
09:24:01 11 country. And there's 300 million people, and, you know,
09:24:06 12 obviously, some have more than one.

09:24:09 13 But, you know, and we know that most -- I mean,
09:24:13 14 I don't know how we know, but we know most of the guns that
09:24:16 15 are out there or the large number of the guns that are out
09:24:19 16 there are handguns. Right? So, they -- so, in *Bruen*, it
09:24:24 17 was undisputed that they were in common use; right?

09:24:27 18 MR. LEHMAN: Right. I don't think anyone
09:24:29 19 questioned that they were. The State didn't press that
09:24:31 20 issue. It would have been a waste of time as --

09:24:34 21 THE COURT: Right, right. It would have been
09:24:35 22 frivolous.

09:24:36 23 MR. LEHMAN: Right.

09:24:36 24 THE COURT: But are the weapons that are banned
09:24:39 25 here, are they in common use in Delaware?

09:24:44 1 MR. LEHMAN: Yes, absolutely. You know, for
09:24:47 2 example, Your Honor -- well, first of all, it's important to
09:24:49 3 remember that *Heller* has been described as a hardware test.
09:24:51 4 And as we were talking about a little bit kind of more
09:24:53 5 informally before, there's no functional difference in terms
09:24:57 6 of firing rate or anything like that between this subset of
09:25:03 7 banned arms and semi-automatic arms in general.

09:25:06 8 THE COURT: Well, how about with machine guns?

09:25:08 9 MR. LEHMAN: Well, machine guns, the difference
09:25:10 10 there was that they were deemed to not be in common use.
09:25:13 11 And as we talked about in the briefing, I mean, they were
09:25:16 12 perceived to be the weapons of gangsters and other
09:25:20 13 criminals. I think overwhelming if you ask --

09:25:22 14 THE COURT: Well, and I think the gangsters and
09:25:24 15 the criminals, that was also sawed-off shotguns; right?

09:25:27 16 MR. LEHMAN: Yes, right. I mean, you imagine
09:25:29 17 basically when you ask people to envision what was going on,
09:25:32 18 you know, envision a Tommy gun, they're thinking of Al
09:25:36 19 Capone.

09:25:36 20 THE COURT: But so, how would a sawed-off
09:25:38 21 shotgun be dangerous and unusual? For that matter, how
09:25:42 22 would a Tommy gun be dangerous and unusual, because the
09:25:46 23 whole problem was there were lots of them?

09:25:48 24 MR. LEHMAN: I think it was -- the issue was
09:25:50 25 that they were not in common use for lawful purposes. They

09:25:52 1 were overwhelmingly put to use by criminals and gangsters,
09:25:56 2 you know, that the FBI was in pursuit of. And --

09:25:59 3 THE COURT: But the --

09:26:16 4 MR. LEHMAN: -- the difference, I think, Your
09:26:17 5 Honor, is that here we're dealing with arms that are in
09:26:20 6 common use for lawful purposes, very, very rarely used in
09:26:23 7 crimes. And the weapons you're talking about were most
09:26:28 8 often used in crimes and not really associated with
09:26:31 9 something that you would have in your home for your own
09:26:35 10 defense.

09:26:36 11 THE COURT: Was there in the -- when some
09:26:40 12 machine guns or even sawed-off shotguns, and I remember
09:26:47 13 seeing somewhere, maybe it was in *Heller*, quoting something
09:26:50 14 else, you know, sawed-off shotguns are the weapons of
09:26:54 15 criminals or something like that. Was that based on any
09:26:59 16 facts or was that just kind of common knowledge of the day?

09:27:03 17 MR. LEHMAN: I'm not aware of specific facts
09:27:07 18 that the Court highlighted. I think it was sort of the
09:27:09 19 common knowledge of the day that there wasn't really a
09:27:12 20 useful purpose for that other than hiding it and creating,
09:27:17 21 you know --

09:27:17 22 THE COURT: But you would agree that, in fact, a
09:27:20 23 sawed-off shotgun would be a great weapon for self-defense;
09:27:23 24 right?

09:27:24 25 MR. LEHMAN: I don't think so. I think that

09:27:27 1 something else would be preferable.

09:27:29 2 THE COURT: Well, no, but you criticize them for
09:27:31 3 saying something is preferable or not preferable.

09:27:34 4 MR. LEHMAN: Well, that's true, although you did
09:27:36 5 ask me if it was great.

09:27:37 6 THE COURT: Wouldn't a sawed-off shotgun, you
09:27:39 7 know, maybe not so much in the street, but in the home,
09:27:42 8 wouldn't that be right up at the top of the list, easy to
09:27:47 9 shoot, takes out whoever is at the door that you don't want?
09:27:51 10 I mean, it's a great self-defense weapon, it would seem to
09:27:56 11 me. But it's just one that was banned or at least heavily
09:28:02 12 restricted, you know, 80 years ago or 90 years ago.

09:28:08 13 I mean, that's one of the things that's
09:28:17 14 difficult is that the -- really it seems to me the two main
09:28:26 15 Supreme Court cases are talking about handguns used for
09:28:31 16 self-defense. One's in the home, one's outside the home.
09:28:40 17 And so, many of the arguments that are being made here,
09:28:52 18 they're far removed from the factual situations where the
09:28:57 19 Supreme Court was talking about things, and so they had
09:29:05 20 various hints about things.

09:29:10 21 And so, I think that's -- I mean, there's
09:29:20 22 really -- and I guess in a way, I mean, if in the 1930's
09:29:30 23 sawed-off shotguns were mostly in the hands of criminals, if
09:29:34 24 they were legalized today, would they be mostly in the hands
09:29:37 25 of criminals, or would everybody be getting a sawed-off

09:29:39 1 shotgun to keep next to their bed?

09:29:42 2 MR. LEHMAN: They might, Your Honor, but it's --
09:29:44 3 you know, they were not in common use for lawful purposes
09:29:47 4 then, and they're not now, either.

09:29:48 5 THE COURT: Well, but, of course, they've been
09:29:50 6 regulated ever since; right?

09:29:52 7 MR. LEHMAN: That's true. I mean, the arms at
09:29:53 8 issue here have not been, which is a major difference.

09:29:56 9 THE COURT: Well, but then the -- well, go
09:29:59 10 ahead.

09:29:59 11 MR. LEHMAN: Well, so, Your Honor, I think,
09:30:03 12 getting back to the common use, I mean, although in *Heller*
09:30:07 13 and *Bruen* the factual circumstances called for discussion of
09:30:12 14 self-defense, the Court, the Supreme Court and the Circuit
09:30:16 15 Courts have been clear that lawful purposes are protected,
09:30:19 16 whether it's for self-defense or not. Although,
09:30:23 17 self-defense is the core of the Second Amendment, right.

09:30:25 18 THE COURT: Yeah, yeah. The Supreme Court said
09:30:27 19 core multiple times in italics, which I take it is extra
09:30:34 20 core.

09:30:34 21 MR. LEHMAN: Right. Yeah, and I think they
09:30:35 22 wouldn't say core if they weren't acknowledging that there
09:30:38 23 was something other than core, otherwise it would just be
09:30:41 24 the right. And so, as far as common use is concerned, you
09:30:45 25 know, we had some examples, Your Honor, of where other

09:30:47 1 courts have taken notice of the fact that these exact arms
09:30:50 2 are in common use, and for that matter, that the magazines
09:30:53 3 at issue are in common use. But by way of one example in
09:30:57 4 the *Caetano* case, the Court, and in particular Justice
09:31:01 5 Alito's concurrence found that the mere fact that 200,000
09:31:05 6 stun guns have been sold to Americans was enough to find
09:31:07 7 that they were in common use for lawful purposes at the time
09:31:11 8 and could not be banned.

09:31:12 9 And our position here, Your Honor, is the same.
09:31:15 10 There are millions and millions of these owned by millions
09:31:18 11 and millions of Americans overwhelmingly used for lawful
09:31:23 12 purposes, virtually never used in crimes. Unfortunately,
09:31:27 13 they tend to get a lot of attention when they are, but it's
09:31:31 14 very rare. And so, the State first sort of tries to change
09:31:43 15 the test by saying --

09:31:44 16 THE COURT: Let me stop you for a second.

09:31:45 17 MR. LEHMAN: Sure.

09:31:46 18 THE COURT: You say rarely used in crime. I
09:31:48 19 think the factual assertions of at least one of the State's
09:31:56 20 experts is they are significantly disproportionately used
09:32:04 21 for mass casualty events. You know, your basic one drug
09:32:11 22 dealer shoots another drug dealer. Yeah, the weapons that
09:32:17 23 are best for self-defense are usually best for offense, too,
09:32:22 24 but that there's a specific problem that the State was
09:32:27 25 concerned about or that the law was concerned about.

09:32:31 1 MR. LEHMAN: Sure. And, I mean, that would be
09:32:33 2 relevant if the Court were undertaking an interest-balancing
09:32:36 3 approach pre-*Bruen*. You know, if the arms at issue are in
09:32:41 4 common use for lawful purposes, generally what criminals
09:32:45 5 rarely use them for, although it's, you know, horrific and
09:32:49 6 unfortunate is not relevant to the analysis of whether the
09:32:52 7 arms are protected by the Second Amendment or not.

09:32:55 8 And so, you know, the data provided by the
09:32:59 9 parties shows that, I mean, and I don't think the State
09:33:01 10 meaningfully disputes, that there are lots and lots of these
09:33:05 11 in circulation.

09:33:06 12 THE COURT: Yeah, and I've seen the numbers,
09:33:08 13 though it's not right in the top of my head. What would you
09:33:11 14 say the number is that are in circulation?

09:33:14 15 MR. LEHMAN: Well, different surveys have come
09:33:17 16 out with different sort of answers. And firearm production
09:33:21 17 numbers provided by the industry over time, I think,
09:33:24 18 suggests that, at the least, perhaps 10 million, possibly
09:33:30 19 quite a lot more. Surveys can sometimes be unreliable
09:33:35 20 because -- well --

09:33:37 21 THE COURT: And basically --

09:33:37 22 MR. LEHMAN: -- unreliable in that they would
09:33:40 23 underestimate because some people are not excited about
09:33:43 24 revealing to whoever is on the phone what they have.

09:33:45 25 THE COURT: But your ball park figure nationally

09:33:53 1 of the number of weapons that are out there that would fall
09:33:58 2 into the banned categories or banned classes is, you know,
09:34:07 3 10 million, plus or minus?

09:34:08 4 MR. LEHMAN: Yes, Your Honor. I think we
09:34:10 5 provided some figures demonstrating that in recent years
09:34:15 6 something like 20 percent of all firearms sold in the United
09:34:18 7 States would fit into the banned category. AR-15 variants,
09:34:24 8 AK variants are extraordinarily popular.

09:34:31 9 So, where I would go from there, Your Honor, is
09:34:36 10 that the *Bruen* Court laid out a text in history test, and I
09:34:42 11 think we've moved beyond the text part. And what the state
09:34:48 12 and what other states, frankly, have suggested post-*Bruen*
09:34:52 13 is, Well, we need a lot of time now to undertake a lot of
09:34:55 14 discovery to lay out this whole historical backdrop. And as
09:35:01 15 I indicated earlier, that could be relevant in the context
09:35:04 16 of other sorts of regulations where we might look backward.
09:35:08 17 But here, where the Supreme Court has already done that work
09:35:11 18 and said, You know, if weapons are not dangerous and
09:35:15 19 unusual, you can't ban them. And so, that really --

09:35:18 20 THE COURT: But it seems to me that if that was
09:35:24 21 the case, they spent a lot of time in *Bruen*, that they could
09:35:27 22 have just said: Handguns are ubiquitous. They're not
09:35:33 23 dangerous and unusual. End of story.

09:35:35 24 MR. LEHMAN: I think they could have done that,
09:35:36 25 although I think that they probably felt it better to lay

09:35:42 1 out the reasoning and go through the historical analysis to
09:35:44 2 explain in sort of an unsalable way why, you know, the
09:35:49 3 dangerous and unusual test is the appropriate one going
09:35:54 4 forward for determining whether a particular arm, or a
09:35:59 5 subset of a category or an entire category like handguns
09:36:03 6 could be banned. And to the extent if an arm is not both
09:36:08 7 dangerous and unusual, it can't be banned. And that's the
09:36:11 8 end of the inquiry, regardless -- like the Court has said,
09:36:14 9 regardless of whether handguns were dangerous and unusual.

09:36:18 10 THE COURT: Well, just to make sure that I've
09:36:19 11 got your point in the dangerous and unusual, bazooka --

09:36:24 12 MR. LEHMAN: Unusual.

09:36:25 13 THE COURT: Unusual, yes. But dangerous, no.

09:36:28 14 MR. LEHMAN: Absolutely. Very dangerous.

09:36:30 15 THE COURT: Or dangerous, yes. Okay. But the
09:36:35 16 banned guns are not dangerous. The bazooka is dangerous,
09:36:39 17 and the banned guns are not or --

09:36:40 18 MR. LEHMAN: No, they're all dangerous.

09:36:42 19 THE COURT: Right. They're all dangerous.

09:36:43 20 MR. LEHMAN: Yes. They're all extremely
09:36:44 21 dangerous.

09:36:44 22 THE COURT: And, in fact, basically all the
09:36:46 23 things that we've described as arms or, I don't know, pepper
09:36:53 24 spray, maybe not, but they're all dangerous; right?

09:36:55 25 MR. LEHMAN: Right. That's the point of an arm.

09:36:57 1 If it were not dangerous, it wouldn't be an arm, which is
09:37:01 2 why you have to move on to determine whether it's unusual in
09:37:04 3 society. And if it's in common use for lawful purposes, the
09:37:08 4 Court has said it's not unusual, and so it doesn't meet the
09:37:11 5 dangerous and unusual test and cannot be banned.

09:37:14 6 And, Your Honor, you sort of cautioned me not to
09:37:19 7 spend a whole lot of time on the other elements. I'm happy
09:37:23 8 to address them very quickly or address any other questions
09:37:26 9 you have in the Second Amendment context, although I think
09:37:30 10 we've covered a lot of the ground.

09:37:33 11 THE COURT: Let me just check my notes here.
09:37:36 12 Hold on a minute.

09:37:56 13 So, one of the things *Bruen* said, and I'm,
09:38:09 14 obviously, paraphrasing here, if we get to the question of
09:38:17 15 history, the Court said, "When a challenged regulation
09:38:24 16 addresses a general societal problem that has persisted
09:38:29 17 since the 18th Century, for lack of social similar
09:38:33 18 historical regulations addressing that problem, it is
09:38:34 19 relevant evidence that the challenged regulation is
09:38:37 20 inconsistent with the Second Amendment."

09:38:38 21 And it goes on to say in a later point, "Other
09:38:45 22 cases implicating unprecedented societal concerns or
09:38:49 23 dramatic technological changes may require a more nuanced
09:38:54 24 approach. The regulatory challenges posed by firearms today
09:38:58 25 are not always the same as those that preoccupied the

09:39:02 1 founders in 1791 or the reconstruction generation in 1868."

09:39:08 2 What do you think that means in terms of the
09:39:20 3 ability to regulate firearms when there are unprecedented
09:39:28 4 societal concerns? And in particular, I think, though,
09:39:45 5 maybe the State's evidence is short on this, I don't know,
09:39:49 6 but I don't think mass shootings in schools was a societal
09:39:55 7 concern in 1790, or 1868 or really for a long ways going
09:40:02 8 forward towards the present.

09:40:05 9 MR. LEHMAN: Well, Your Honor, I don't think I
09:40:07 10 would draw the distinction that narrowly between gun
09:40:10 11 violence more generally, which has been a societal issue
09:40:14 12 probably since guns were invented. I think Beretta was
09:40:19 13 founded in 15 something, so it's been going on for a while.
09:40:22 14 And certainly it was going on in the, you know, '20's and
09:40:25 15 '30's when, you know, Al Capone and friends were using Tommy
09:40:28 16 guns and --

09:40:30 17 THE COURT: And the result was Tommy guns got
09:40:33 18 regulated and essentially banned; right?

09:40:36 19 MR. LEHMAN: Right. And semi-automatic weapons
09:40:38 20 have never undergone the same sort of regulation, I think,
09:40:43 21 until 1994 in the famously ineffective assault weapons ban
09:40:48 22 that expired. Other than that, it's just been in the past
09:40:51 23 ten years or so that States have decided to take the sort of
09:40:55 24 measures that Delaware has.

09:40:58 25 THE COURT: But isn't it also more or less in

09:41:00 1 the past 10 or 20 years that the punitive reason for this
09:41:08 2 legislation has surfaced?

09:41:13 3 MR. LEHMAN: I don't think that mass shootings
09:41:16 4 have surfaced in the past 20 years. But like we talked
09:41:21 5 about earlier and like we said in the briefing, whether the
09:41:26 6 State is hyper-focused on that issue is a little different
09:41:30 7 than whether it -- or I think it rises to the level that it
09:41:34 8 would imbalance that lawful use for a common purposes
09:41:39 9 requirement. And as we noted in the briefing, not just
09:41:44 10 these banned rifles, but any rifles at all kill fewer people
09:41:49 11 in the United States every year than bare hands by
09:41:51 12 themselves do, knives by themselves do, or blunt objects by
09:41:56 13 themselves do. And in most years, less than lightning does.

09:41:59 14 And so, you know, to the extent that's relevant,
09:42:06 15 we just don't feel that it creates the sort of issue that
09:42:10 16 would upset the requirement that the guns be dangerous and
09:42:18 17 unusual. And because there are so many millions of these
09:42:19 18 that are owned by people who use them for purposely innocent
09:42:22 19 purposes and are very rarely used in crimes, I'm not sure
09:42:27 20 that really rises to the level of an unprecedented societal
09:42:31 21 concern that throws off that balance in a material way in
09:42:36 22 terms of a Second Amendment analysis.

09:42:38 23 THE COURT: Well, so your position is that
09:42:41 24 unless you can say a weapon is dangerous and unusual,
09:42:49 25 essentially the State can't regulate it?

09:42:52 1 MR. LEHMAN: Yes, I think that -- I think the
09:42:53 2 Supreme Court has made that pretty clear that in the context
09:42:56 3 of banning arms, the question is whether they're unusual in
09:43:02 4 society at large. And to the extent they're in common use
09:43:05 5 for lawful purposes, the Court has told us they are not
09:43:09 6 unusual. And so, they can't meet that test, and they can't
09:43:12 7 be banned.

09:43:17 8 THE COURT: So --

09:43:23 9 MR. LEHMAN: And I think in casting off that
09:43:25 10 interest balancing, the Court made it clear that it's not if
09:43:29 11 they're dangerous, they're not unusual, but you're extremely
09:43:32 12 worried about them, you know, is not the test. It's a
09:43:37 13 purely dangerous and unusual test. If they're in common use
09:43:40 14 for lawful purposes, they don't meet that test.

09:43:43 15 THE COURT: So, let's assume as a fact that
09:43:47 16 semi-automatic rifles and assault pistols are based on the
09:44:00 17 evidence of Mr. Yurgealitis, not very good weapons for
09:44:06 18 self-defense. I mean, I know your answer basically. You
09:44:16 19 could have a weapon -- well, I haven't asked a question.

09:44:19 20 If you had a weapon that had no self-defense,
09:44:26 21 really no use for self-defense, let's say a hand grenade,
09:44:31 22 but it was useful for going out and hunting in a kind of
09:44:36 23 different style than most people hunt by blowing up animals,
09:44:43 24 if people had lots of grenades that had been handed down
09:44:49 25 from their grandfathers who fought in World War II, they

09:44:54 1 couldn't be regulated; is that right?

09:44:59 2 MR. LEHMAN: I mean, I think that they would
09:45:02 3 have been dangerous and unusual even at the time of the end
09:45:06 4 of World War II --

09:45:07 5 THE COURT: But we're --

09:45:08 6 MR. LEHMAN: -- in that hypothetical.

09:45:09 7 THE COURT: But it's not hypothetical, I think,
09:45:10 8 because I've seen movies. Lots of people kept souvenirs of
09:45:14 9 the war.

09:45:15 10 MR. LEHMAN: Mm-hmm.

09:45:16 11 THE COURT: And I don't know, it's entirely
09:45:22 12 possible. I mean, so just assume that enough people, let's
09:45:26 13 say 200,000 had hand grenades from World War II hanging
09:45:33 14 around their houses as essentially a collector's item, which
09:45:37 15 I would imagine is what most people would have it for. They
09:45:45 16 would be, in your view, not dangerous and unusual; right?

09:45:49 17 MR. LEHMAN: I don't know that they would be in
09:45:52 18 common use for lawful purposes if they're not serving any --

09:45:56 19 THE COURT: But so, collection is a lawful
09:45:58 20 purpose; right?

09:45:58 21 MR. LEHMAN: It is, yes.

09:46:00 22 THE COURT: And --

09:46:01 23 MR. LEHMAN: I think depending on -- certainly,
09:46:03 24 that would be something that if it came up, I guess the
09:46:05 25 Court would have to grapple with it. I think it ties in a

09:46:08 1 little bit with what the State was sort of proposing with
09:46:11 2 sort of a doom's day scenario where the market is flooded
09:46:13 3 with something, and it automatically becomes in common use.

09:46:19 4 THE COURT: But, I mean, leaving aside the
09:46:24 5 likelihood of that actually happening, if, you know,
09:46:33 6 somebody came up with a new weapon and had -- kind of the
09:46:38 7 way we used to imagine drug dealers did things, give away a
09:46:42 8 few hundred thousand for free and create a demand, and then
09:46:46 9 we'll raise our prices and start selling them for real.

09:46:48 10 Is there a temporal aspect in common use? Is
09:46:57 11 that the in common use over the last "X" number of years, or
09:47:02 12 is it moment in time when the law is passed, we figure out
09:47:08 13 how many of them are out there?

09:47:10 14 MR. LEHMAN: Well, what the Supreme Court has
09:47:13 15 told us is that the relevant inquiry is whether something is
09:47:17 16 a common use for lawful purposes today. So, regardless of
09:47:20 17 whether it was in common use at some point in the past, as
09:47:24 18 Your Honor indicated, it's extraordinarily unlikely that
09:47:28 19 that would ever happen. And I suppose if it did, maybe the
09:47:32 20 Court would have something slightly different to say about,
09:47:35 21 you know, an intentional effort to skirt that issue. But
09:47:42 22 it's not what's happening here.

09:47:45 23 So, it's an interesting hypothetical, but not, I
09:47:47 24 think, relevant to the constitutionality of the bans that
09:47:51 25 are at issue -- the arms that are at issue in this case,

09:47:54 1 which, you know, indisputably have been very popular for,
09:47:56 2 you know, quite a while and are very popular today.

09:47:59 3 THE COURT: So, let's assume for the sake of
09:48:03 4 argument that I don't agree with you that for, you know,
09:48:07 5 likelihood of success on the merits here that the fact that,
09:48:20 6 let's say, there's 10 million of these in the United States
09:48:26 7 means they can't be regulated anymore.

09:48:40 8 What was my thought here? I forgot what my
09:48:50 9 thought is.

09:48:51 10 So, actually I do have a slightly different
09:48:54 11 question. So, in Delaware, there's a crime called carrying
09:49:03 12 a concealed deadly weapon; right? Does that mean that if
09:49:07 13 I'm, you know, a non-felon, non-illegal alien, non the
09:49:15 14 various other things that cause you to be a prohibited
09:49:18 15 person, and I strap on a holster and put a .45 pistol, a
09:49:25 16 non-banned gun in it, I can just walk around on the streets
09:49:29 17 with my gun; right?

09:49:31 18 MR. LEHMAN: Yes, in Delaware, you can --

09:49:32 19 THE COURT: So --

09:49:33 20 MR. LEHMAN: -- assuming it's not concealed.
09:49:34 21 You need a permit to conceal it.

09:49:36 22 THE COURT: Right, right. That's the point.
09:49:38 23 And so, I must admit I don't see too many people walking
09:49:45 24 around like that.

09:49:45 25 MR. LEHMAN: I've only ever seen one or two

09:49:47 1 myself, Your Honor.

09:49:48 2 THE COURT: But the point is that, as the
09:49:52 3 Defendant's expert says, if you're going to walk around with
09:49:56 4 a gun or at least a handgun for self-defense, it's useful to
09:50:02 5 be able to carry it concealed. And, you know, that's the
09:50:06 6 reason why we have a permitting process and that's the
09:50:08 7 reason why *Bruen* was in the Supreme Court to begin with.

09:50:11 8 I don't think I've ever seen anybody walking
09:50:15 9 around, you know, with a banned gun. And I think they'd be
09:50:28 10 pretty hard to actually -- particularly the rifles, they
09:50:31 11 would be pretty hard to actually conceal on your person.

09:50:33 12 MR. LEHMAN: They are. I've frequently seen
09:50:36 13 people carry, usually at events, you know, sort of rallies
09:50:38 14 that were scheduled for that purpose. I've never attended
09:50:42 15 one, but I --

09:50:43 16 THE COURT: No, no, but that would be -- but
09:50:44 17 they're not carrying them for self-defense. They're
09:50:48 18 carrying them for some other reason.

09:50:49 19 MR. LEHMAN: Well, if they needed it for
09:50:51 20 self-defense, they have it. I can't speak to why, in those
09:50:53 21 circumstances, they were. Maybe it was both. You know,
09:50:55 22 maybe they perceived the likelihood of, you know,
09:50:59 23 counter-protestors attacking them or something. I have no
09:51:02 24 idea.

09:51:02 25 THE COURT: All right. Does it make any

09:51:08 1 difference -- let's assume there are 10 million of these
09:51:16 2 guns out there. Does it make any difference whether there's
09:51:19 3 evidence about how many of the 10 million carry, or bear or
09:51:29 4 keep, I guess, the weapons for self-defense as to some other
09:51:37 5 purpose?

09:51:37 6 MR. LEHMAN: No, it doesn't matter.
09:51:40 7 Constitutionally, you know, the Second Amendment gives you
09:51:42 8 the right to keep and to bear arms. And the Court has
09:51:45 9 recognized that there are other lawful purposes besides
09:51:47 10 self-defense. And so, you're perfectly entitled to keep a
09:51:53 11 protected arm in your home for whatever purpose you want.

09:51:56 12 THE COURT: Is there --

09:51:57 13 MR. LEHMAN: It's not illegal.

09:51:58 14 THE COURT: -- any good evidence of the 10
09:52:03 15 million people or the 10 million firearms, how many of them
09:52:09 16 are kept or carried for self-defense, in part or in whole,
09:52:23 17 as opposed to some of the other purposes like, for example,
09:52:26 18 target shooting?

09:52:27 19 MR. LEHMAN: There are, Your Honor. And I don't
09:52:29 20 have the citation to that source right in front of me, but
09:52:34 21 there was, I think, either in the Gray Plaintiffs' opening
09:52:39 22 brief, or a Complaint or in the reply, we had citations to
09:52:44 23 surveys where people were asked specifically about the
09:52:47 24 ownership of AR-15 sorts of rifles and why they have them.
09:52:53 25 A substantial number of people said it was for personal

09:52:55 1 protection. Another substantial percentage of people said
09:53:00 2 it's for recreational target shooting. And I know that, you
09:53:06 3 know, at least one of the State's experts opined that
09:53:09 4 they're not ideal for hunting, although a substantial number
09:53:13 5 of people also indicated that they use them for that purpose
09:53:15 6 as well, partially because these sorts of rifles come in
09:53:20 7 different calibers. And while this sort of most common .223
09:53:25 8 ammunition is not ideal in most hunting scenarios, there are
09:53:30 9 other calibers that are more suited to that. So, it's the
09:53:33 10 same rifle, just shoots a different caliber of bullet.

09:53:36 11 THE COURT: Do the assault pistols, do some of
09:53:41 12 the ones that are in the legislation use 9-millimeter
09:53:49 13 ammunition?

09:53:49 14 MR. LEHMAN: Yes. Yes.

09:53:50 15 THE COURT: Okay.

09:53:51 16 MR. LEHMAN: As my colleague indicated earlier,
09:53:56 17 the distinction seems to be, well, they bear a resemblance
09:54:01 18 or ostensibly derived from a military weapon. And that's
09:54:07 19 really the -- seems to be the distinction, not that they
09:54:11 20 operate in a different way than any other semi-automatic.

09:54:16 21 THE COURT: No. I was just wondering because
09:54:18 22 you mentioned the caliber.

09:54:19 23 MR. LEHMAN: Right. Yeah. Yeah, it varies.

09:54:20 24 THE COURT: And my impression was, just an
09:54:23 25 impression, but my impression was that a lot of the weapons

09:54:30 1 in question were designed to or maybe do shoot a bigger
09:54:36 2 caliber ammunition.

09:54:38 3 MR. LEHMAN: Some do, but, honestly, the
09:54:40 4 Government, the military uses 9-millimeter ammunition. So,
09:54:44 5 it's not, you know, 9-millimeter ammunition was designed, I
09:54:48 6 think, for use by NATO countries. So, it's not -- you know,
09:54:52 7 these pistols and rifles are not using any extra special,
09:54:56 8 you know, ammunition that's not common generally among
09:55:01 9 firearms.

09:55:01 10 THE COURT: All right. Mr. Lehman, thank you.
09:55:03 11 Maybe I'll hear from Mr. Pileggi.

09:55:05 12 MR. LEHMAN: Sure. I did have one housekeeping
09:55:07 13 matter very briefly.

09:55:09 14 THE COURT: Yes.

09:55:09 15 MR. LEHMAN: There was that *Graham* case that
09:55:11 16 also is a magazine case and is before Your Honor. And as
09:55:15 17 you know, my friends here and I agreed amongst ourselves to
09:55:19 18 consolidate that one here. And the idea was to have those
09:55:23 19 Plaintiffs just file a joinder with our motion.

09:55:26 20 THE COURT: So, remind me: Which case number is
09:55:27 21 that?

09:55:28 22 MR. LEHMAN: I don't have the number right in
09:55:30 23 front of me, Your Honor, but that was *Graham vs. Jennings*.

09:55:34 24 THE COURT: Graham, G-R-A-H-A-M?

09:55:37 25 MR. LEHMAN: Yes, that was assigned to Your

09:55:39 1 Honor, and we entered a stipulation indicating our plan for
09:55:44 2 consolidating that one and for a joinder that was going to
09:55:46 3 be very simple, not any other argument that would complicate
09:55:49 4 the record, but just sort of standing facts.

09:55:52 5 THE COURT: So, you already filed something.
09:55:55 6 Did I sign it?

09:55:56 7 MR. LEHMAN: I think the stipulation was signed.
09:55:59 8 We've not done the joinder or anything. I think we've all
09:56:02 9 been kind of preoccupied for preparing for this, but that
09:56:05 10 can be done very quickly to make sure it's not an awkward
09:56:08 11 procedural situation.

09:56:09 12 THE COURT: So, what you're saying is there's a
09:56:10 13 stipulation saying we're going to do this, but we haven't
09:56:13 14 actually done that yet?

09:56:14 15 MR. LEHMAN: Right --

09:56:14 16 THE COURT: Okay.

09:56:15 17 MR. LEHMAN: -- the act of stipulating to
09:56:16 18 consolidating it and submitting the joinder.

09:56:19 19 THE COURT: And so, I was actually looking this
09:56:21 20 morning because I saw a case because I think I had -- I
09:56:28 21 either have four or five of these, I'm not sure how many
09:56:31 22 exactly, but there was one that I looked at it. And it was,
09:56:35 23 you know, SS 1 for SB 6. Is that the case you're talking
09:56:40 24 about?

09:56:40 25 MR. LEHMAN: Yes. It's a magazine challenge as

09:56:43 1 well.

09:56:43 2 THE COURT: Yeah, yeah. So, thank you for that
09:56:46 3 because I was wondering: How is that going to be different
09:56:53 4 than this case?

09:56:54 5 MR. LEHMAN: It's not.

09:56:55 6 THE COURT: So, if it's joined to this one, that
09:56:57 7 would be great, as far as I'm concerned.

09:56:59 8 MR. LEHMAN: That's the plan. I just wanted to
09:57:00 9 update Your Honor about what was going on so you weren't
09:57:03 10 wondering why we hadn't done anything.

09:57:04 11 THE COURT: Okay.

09:57:05 12 MR. LEHMAN: Thank you.

09:57:06 13 THE COURT: Let me ask just one other question.
09:57:09 14 I feel confident that if I deny the motion for preliminary
09:57:13 15 injunction, you're going to appeal to the Third Circuit.

09:57:16 16 MR. LEHMAN: I think that's right.

09:57:18 17 THE COURT: So, I also have this trial scheduled
09:57:23 18 in November, whenever it's scheduled. Do you actually plan
09:57:28 19 to do any discovery for that or you basically -- maybe I'm
09:57:40 20 not asking the question very well.

09:57:43 21 You know, your argument to date has been
09:57:47 22 essentially, This is a pure legal question. Look at the
09:57:52 23 statute. It's unconstitutional. It's over.

09:57:58 24 I'm just wondering, if I were to deny your
09:58:04 25 motion, I'm guessing it would take the Third Circuit a while

09:58:09 1 to figure out what they were going to do about it. Are you
09:58:14 2 planning to -- would you be planning to engage in discovery
09:58:17 3 in the mean time or what, or is that something that you
09:58:22 4 figure -- that's a scenario that's not been contemplated
09:58:26 5 yet?

09:58:26 6 MR. LEHMAN: It's not been contemplated yet,
09:58:29 7 although our position in this case and generally in these
09:58:32 8 sorts of cases post-*Bruen*, to the extent it involves a ban
09:58:36 9 on arms themselves, is that discovery is not necessary at
09:58:39 10 all. And so, I think we would -- I don't anticipate that
09:58:43 11 that would change, although, I guess, you know, depending on
09:58:47 12 the basis upon which the motion was denied might factor into
09:58:53 13 that calculus, but I don't anticipate any discovery.

09:58:56 14 THE COURT: So, one of the things is to the
09:58:58 15 extent that, either for the purposes of this motion or for
09:59:02 16 later on, that I'm concerned about the historical regulation
09:59:06 17 of arms, looking for what I believe the Supreme Court
09:59:14 18 described as relevantly similar regulation, for present
09:59:28 19 purposes, in other words for this motion, do you think Bowie
09:59:48 20 knives are relevantly similar?

09:59:50 21 MR. LEHMAN: No. No, Your Honor. And as we
09:59:54 22 kind of -- we addressed somewhat in the reply brief, really
10:00:01 23 those regulations, number one, address arms that were not in
10:00:06 24 lawful -- you know, not in common use for lawful purposes.
10:00:10 25 They were perceived at the time to be overwhelmingly not

10:00:13 1 using -- not being used for lawful purposes and being used
10:00:15 2 instead for, you know, mob violence and things like that.

10:00:22 3 So, we don't think the State has proffered any
10:00:25 4 relevantly similar regulations, although we don't think it
10:00:28 5 would matter if they had, because what the Supreme Court has
10:00:32 6 said is if they're in lawful use for common purposes today,
10:00:35 7 we don't really care about what happened before. And so, in
10:00:38 8 the context of handguns, they said, Well, who cares if they
10:00:42 9 thought they were dangerous and unusual several hundred
10:00:44 10 years ago. They're not today, so it doesn't matter what
10:00:47 11 they thought before.

10:00:48 12 THE COURT: All right. And on kind of the same
10:00:51 13 general topic, my impression from something that I think was
10:01:00 14 hinted at in *Bruen*, and maybe it was said in *Heller*, I can't
10:01:02 15 remember. It sticks in my head, but I couldn't place where
10:01:05 16 it was that I had seen it. To the extent I get into
10:01:08 17 historical regulation, I don't have to go out and do my own
10:01:17 18 independent history. I can rely -- I can basically take
10:01:20 19 whatever it is that the parties give me, which at this point
10:01:24 20 is the Defendant has given me stuff, and you haven't.

10:01:29 21 Right?

10:01:29 22 MR. LEHMAN: Right.

10:01:30 23 THE COURT: Okay. Thank you, Mr. Lehman. It's
10:01:32 24 all been very helpful.

10:01:33 25 MR. LEHMAN: Just as a slight followup to answer

10:01:35 1 your question, if you were to do that, you could essentially
10:01:41 2 just, you know, reread *Bruen* for that purpose, because they
10:01:45 3 undertook the entire task of going back through the
10:01:48 4 historical record and in the context of banning arms
10:01:51 5 determining, you know, how it should be valued.

10:01:55 6 THE COURT: Well, was there something in *Bruen*
10:01:57 7 about Bowie knives?

10:01:59 8 MR. LEHMAN: They went through that discussion
10:02:00 9 of Bowie knives, sword canes, clubs, you know, a variety of
10:02:05 10 daggers, a variety of things that, you know, at the time
10:02:09 11 were perceived to be almost exclusively in use by criminals.

10:02:13 12 THE COURT: All right. Okay. Thank you.

10:02:25 13 MR. LEHMAN: Thank you.

10:02:25 14 THE COURT: Mr. Pileggi.

10:02:27 15 MR. PILEGGI: May it please the Court, good
10:02:36 16 morning, Your Honor. Francis Pileggi of Lewis Brisbois for
10:02:40 17 the Plaintiffs, Your Honor. I just have a logistical
10:02:44 18 question. I think Your Honor assigned one hour for each
10:02:46 19 side, and we've already exceeded --

10:02:48 20 THE COURT: Well, I used up the first
10:02:50 21 15 minutes --

10:02:50 22 MR. PILEGGI: So, I just don't know how much
10:02:51 23 time I have.

10:02:52 24 THE COURT: -- so that doesn't count. Why don't
10:02:54 25 you go ahead. I mean --

10:02:56 1 MR. PILEGGI: Excuse me.

10:02:58 2 THE COURT: -- you know --

10:03:00 3 MR. PILEGGI: I'll try to be brief.

10:03:01 4 THE COURT: -- for the magazine, I mean, I guess
10:03:04 5 it seems to me like one of the questions is: Are they arms
10:03:11 6 or not, which is what -- the Defendant says they're not
10:03:15 7 arms. And I guess, regardless of the answer to that
10:03:18 8 question, I guess, even if I were to agree with the
10:03:27 9 Defendants, they're not arms, I'm kind of wondering whether
10:03:31 10 that even makes any difference --

10:03:33 11 MR. PILEGGI: Well, Your Honor --

10:03:36 12 THE COURT: -- I mean, because of their
10:03:37 13 relationship to things that are arms.

10:03:40 14 MR. PILEGGI: Right. Well, Your Honor, I want
10:03:44 15 to be responsive to your question, so let me start out by
10:03:48 16 answering your question. And then if I have a few extra
10:03:50 17 minutes, I'll go back --

10:03:51 18 THE COURT: Yeah, yeah. Don't worry about the
10:03:52 19 time.

10:03:53 20 MR. LEHMAN: -- to the other ones. Your Honor,
10:03:54 21 the Third Circuit has already found that ammunition fits
10:03:58 22 within the definition, the constitutional concept of arms.

10:04:01 23 THE COURT: But we're not talking ammunition
10:04:04 24 here; right?

10:04:05 25 MR. PILEGGI: Well, that's a very good point,

10:04:07 1 Your Honor. But in terms of magazines, I'll answer it
10:04:11 2 another way. Magazines have -- while we're specifically
10:04:18 3 talking about what they refer to as large-capacity magazines
10:04:22 4 as opposed to just any old magazines. And magazines, these
10:04:27 5 large-capacity magazines have been determined by at least
10:04:34 6 one Federal Court -- actually, let me stick with the Third
10:04:37 7 Circuit. The Third Circuit found that there's no
10:04:40 8 long-standing history of large-capacity magazine regulation.
10:04:45 9 So, I think whether or not they're --

10:04:48 10 THE COURT: Which case was that?

10:04:50 11 MR. PILEGGI: That's the *Association of New*
10:04:54 12 *Jersey Rifle & Pistol Clubs vs. The Attorney General of New*
10:04:56 13 *Jersey*, 910 F.3d. 106, Pages specifically 116 to 117 and
10:05:03 14 Footnote 18. And that case has a very lengthy procedural
10:05:07 15 history, Your Honor --

10:05:08 16 THE COURT: Right, right. But I've seen --

10:05:09 17 MR. PILEGGI: -- many, many --

10:05:10 18 THE COURT: -- that case, but it was more for
10:05:12 19 procedural history.

10:05:13 20 MR. PILEGGI: Right. So, this particular
10:05:15 21 decision that said that, Your Honor, was in 2018, but you'll
10:05:19 22 see that subsequent to 2018, there were many other
10:05:23 23 iterations. And I don't know if you want me to go through
10:05:26 24 the procedure.

10:05:27 25 THE COURT: All right. So, actually, just so at

10:05:28 1 least the one iteration of it was an appeal from a
10:05:31 2 preliminary injunction --

10:05:33 3 MR. PILEGGI: Correct.

10:05:34 4 THE COURT: -- was in 2018. The appeal from the
10:05:37 5 preliminary injunction, was that some kind of final
10:05:39 6 decision?

10:05:39 7 MR. PILEGGI: That was the first appeal from the
10:05:42 8 denial of the preliminary injunction. And then there was
10:05:45 9 many other subsequent decisions, but I don't think that
10:05:48 10 particular finding was either changed or altered in the
10:05:53 11 subsequent history.

10:05:53 12 THE COURT: And so, the finding was that a
10:05:55 13 large-capacity magazine was protected by the Second
10:05:59 14 Amendment?

10:05:59 15 MR. PILEGGI: Well, let me give you the quote,
10:06:01 16 and then if I can answer the question after I give that
10:06:04 17 quote.

10:06:04 18 THE COURT: Sure, that would be good.

10:06:05 19 MR. PILEGGI: Part of my answer is the quote.
10:06:08 20 The quote is, "There is no long-standing history of
10:06:10 21 large-capacity magazine regulation." And in further answer
10:06:15 22 of your question, Your Honor, they applied the pre-*Bruen*
10:06:18 23 intermediate scrutiny test.

10:06:20 24 So, our position would be if they were applying
10:06:24 25 the correct standard under *Bruen*, the result might be

10:06:28 1 different. But at least it's relevant to the answer to your
10:06:31 2 question that at least in the context of that decision --

10:06:35 3 THE COURT: Well, when you say the answer might
10:06:36 4 be different, the *Bruen* -- the analysis might be different,
10:06:48 5 but surely your position is the answer would be the same.

10:06:50 6 MR. PILEGGI: Well, Your Honor, under *Bruen* the
10:06:53 7 test is: Is it consistent with the nation's tradition of
10:06:57 8 firearm regulation? And the Third Circuit found that
10:07:01 9 regarding large-capacity magazines, there was no history of
10:07:05 10 regulation. There is no history of regulation of
10:07:09 11 large-capacity magazines. So, if we're applying the *Bruen*
10:07:11 12 standard instead of the pre-*Bruen* intermediate standard, I
10:07:15 13 think the conclusion, based on that finding, would have to
10:07:17 14 be different. And I'm not suggesting that's the only
10:07:21 15 analysis, but that's a very big part of the analysis. Of
10:07:24 16 course, we also have the common use aspect and the other
10:07:29 17 aspects of it.

10:07:29 18 THE COURT: Maybe I'm remembering things wrong,
10:07:31 19 because I haven't looked at this case for today's
10:07:35 20 proceedings, but I thought the denial of the preliminary
10:07:38 21 injunction was reversed.

10:07:39 22 MR. PILEGGI: Your Honor, there's a very lengthy
10:07:42 23 history. I think the net result was, and I apologize if I
10:07:47 24 don't have all this committed to memory, but I think
10:07:50 25 eventually it ended up being the case that was vacated

10:07:55 1 post-*Bruen*. So, eventually after many years, it ended up
10:07:59 2 being appealed to the U.S. Supreme Court. And one of the
10:08:02 3 things that was done, among several other Circuit Courts --

10:08:06 4 THE COURT: Right, right.

10:08:07 5 MR. PILEGGI: -- that were -- decisions were
10:08:09 6 vacated and remanded in light of *Bruen*. And I think -- I
10:08:12 7 will double-check, Your Honor. I'll be happy to submit
10:08:14 8 something later today, but I'm pretty sure that a final
10:08:17 9 iteration of that case ended up before the Supreme Court.
10:08:20 10 And that's one of the cases that was vacated --

10:08:22 11 THE COURT: Okay.

10:08:23 12 MR. PILEGGI: -- and then sent back.

10:08:26 13 MR. LEHMAN: Your Honor, very briefly. A case
10:08:27 14 that I have in New Jersey was just consolidated with that
10:08:29 15 case. And most recently I think the Third Circuit remanded
10:08:32 16 it for proceedings consistent with *Bruen*. And that's where
10:08:36 17 it stands today.

10:08:38 18 MR. PILEGGI: It's a very long procedural
10:08:41 19 history.

10:08:41 20 THE COURT: Okay.

10:08:42 21 MR. PILEGGI: So, Your Honor, if I can just
10:08:44 22 summarize an answer to your question. Of course it's an
10:08:48 23 important issue whether or not it's considered within the
10:08:52 24 constitutional concept of arms. But the fact that the Third
10:08:55 25 Circuit's already, at least in one iteration of that case,

10:08:58 1 determined that there is no long-standing history of
10:09:01 2 regulation of large-capacity magazines, I think that's
10:09:05 3 helpful to the analysis.

10:09:13 4 Well, I'm going to be respectful of the Court's
10:09:17 5 time, so I'm just going to try to give a very abbreviated
10:09:20 6 discussion of some of the topics. I'd like to, if I can
10:09:23 7 very briefly, just by way of background and context, mention
10:09:26 8 the timing of the legislative process where these challenged
10:09:31 9 statutes were passed.

10:09:32 10 THE COURT: Although, my impression is they were
10:09:34 11 passed before *Bruen*.

10:09:36 12 MR. PILEGGI: Well, Your Honor, with one caveat,
10:09:38 13 the legislature in the Senate and the House voted in favor
10:09:44 14 of it before *Bruen*. Then, to be specific, it was June 19th
10:09:50 15 of 2022.

10:09:51 16 June 23rd, a week later, approximately a week
10:09:54 17 later, *Bruen* came out. And then seven days later, the
10:09:59 18 Governor signed it.

10:10:00 19 The important point I'd like to make, Your
10:10:02 20 Honor, is that they had at least a week after *Bruen* to
10:10:08 21 consider *Bruen*, to determine if, based on *Bruen* the
10:10:13 22 legislation that they had voted on, but had not yet become
10:10:16 23 law, should be modified in any way. But they didn't.

10:10:19 24 And in addition to that, after *Bruen*, two
10:10:24 25 decisions of the Court of Appeals that were on appeal to the

10:10:28 1 Supreme Court were vacated.

10:10:30 2 THE COURT: And I guess, what's your point here?

10:10:32 3 MR. PILEGGI: My point is that it's relevant in
10:10:34 4 terms of the legislature not caring whether or not this
10:10:39 5 statute complied with *Bruen*. They had an opportunity to
10:10:42 6 read *Bruen* and consider, and it's possible that they read
10:10:46 7 *Bruen*, and said, You know what, it's still fine. We
10:10:48 8 don't --

10:10:48 9 THE COURT: This doesn't sound very relevant to
10:10:50 10 me because I don't recall seeing any of these cases turning
10:10:53 11 on whether or not the legislature cared about things or not.

10:10:56 12 MR. PILEGGI: All right. Then, Your Honor,
10:10:58 13 this, I think, might be -- I know it is in our briefs, and I
10:11:03 14 think it's worth emphasizing.

10:11:05 15 House Bill 450 was based -- the first, and we
10:11:09 16 have this in our briefs, and I'll just be very, very
10:11:12 17 abbreviated on this. In the synopsis of the prior iteration
10:11:17 18 of HB 450, which was Senate Bill 68, it specifically said
10:11:21 19 that this is based on a Maryland statute. And this statute
10:11:26 20 is constitutional because it's based on a Fourth Circuit
10:11:30 21 decision called *Kolbe* which upheld it.

10:11:33 22 Well, the point I'm trying to make, and I didn't
10:11:36 23 make it very good the first time. I'm going to try this
10:11:39 24 time --

10:11:39 25 THE COURT: But this one seems -- I think it is

10:11:41 1 probably a much more relevant point.

10:11:43 2 MR. PILEGGI: Yes, so let me focus on this one.

10:11:46 3 So, after *Bruen* was decided -- well, let me back up.

10:11:52 4 THE COURT: So, but I think I got this from the
10:11:54 5 briefing. The Fourth Circuit approved whatever the Maryland
10:11:57 6 law was or said it wasn't unconstitutional. And then when
10:12:02 7 the Supreme Court issued *Bruen*, they vacated and remanded a
10:12:06 8 lot of different Courts of Appeal cases, including the
10:12:09 9 Fourth Circuit one.

10:12:09 10 MR. PILEGGI: Right.

10:12:10 11 THE COURT: And I forget, but what I forget is
10:12:13 12 has the Fourth Circuit done something since then?

10:12:16 13 MR. PILEGGI: I don't think any final decision
10:12:17 14 has been made on that, to my knowledge. But the point is HB
10:12:23 15 450 was based on a Maryland statute very similar that banned
10:12:28 16 certain types of firearms and certain magazines. And at
10:12:32 17 least in the synopsis of the bill, the first iteration of
10:12:36 18 the bill, they said, This is fine because it's been upheld
10:12:39 19 by the Fourth Circuit. But that Fourth Circuit decision
10:12:41 20 that they relied on has been vacated.

10:12:44 21 THE COURT: Right, but I didn't go to check
10:12:47 22 this, because in my general knowledge, which I hope is
10:12:51 23 correct, when the Supreme Court issues a decision, and it
10:12:55 24 has cert pending petitions of a similar nature, isn't it
10:13:03 25 general practice to vacate and remand them for consideration

10:13:06 1 in light of whatever decision is just decided, so that
10:13:09 2 the -- while the Fourth Circuit -- because it's been vacated
10:13:14 3 is not law. The vacating and remanding doesn't really
10:13:18 4 indicate anything about whether or not the Fourth Circuit
10:13:20 5 was wrong or right or maybe it indicates they did the wrong
10:13:26 6 analysis because they used the two-step thing and the
10:13:29 7 Supreme Court has said, No, it's a one-step thing.

10:13:31 8 So, but that doesn't really -- I don't know.
10:13:39 9 That's what I would get out of that.

10:13:41 10 Am I missing something?

10:13:42 11 MR. PILEGGI: Your Honor, I respect your
10:13:43 12 analysis, and I'm not going to disagree with it other than
10:13:46 13 to say the decision on which the legislation was originally
10:13:52 14 based saying that this is fine, has been vacated. And now
10:13:56 15 what the result of a vacated decision is, maybe they'll go
10:13:59 16 back and apply the new standard and reach the same result.
10:14:02 17 Nobody knows, but I don't think it's the same as saying,
10:14:06 18 Okay, that's a sound analysis.

10:14:09 19 THE COURT: Do you know what the -- because
10:14:19 20 *Bruen* was, you know, last June. We're now, what, I don't
10:14:22 21 know, eight or nine months since then. Is that case still
10:14:29 22 with the Fourth Circuit?

10:14:31 23 MR. PILEGGI: Your Honor, I have to
10:14:33 24 double-check. I've looked. I didn't look before I came
10:14:37 25 here today, but I did look. And my understanding is that a

10:14:41 1 lot of those similar cases that were vacated, at least two
10:14:46 2 that I know of, the Court remanded back to the District
10:14:49 3 Court for historical finding, although it's very much a
10:14:54 4 disputed issue whether it was necessary to remand it. But I
10:14:58 5 don't know that any final decision has been made subsequent
10:15:01 6 to the case being vacated.

10:15:02 7 THE COURT: So, hold on a second. I think
10:15:04 8 Mr. Lehman might know, one way or another.

10:15:04 9 MR. LEHMAN: Your Honor, I distinctly recall
10:15:07 10 listening to the oral argument that recently happened since
10:15:11 11 it came back down, so I think --

10:15:13 12 THE COURT: So, it's under --

10:15:14 13 MR. LEHMAN: The oral argument has happened, and
10:15:18 14 they just haven't issued their decision yet, I believe is
10:15:21 15 where that stands.

10:15:22 16 THE COURT: Okay.

10:15:24 17 MR. PILEGGI: I follow these things pretty
10:15:25 18 closely, and I think I would have heard if there was a
10:15:28 19 decision.

10:15:28 20 THE COURT: Right. So, that's the kind of
10:15:31 21 thing, you know, obviously, if the Fourth Circuit says
10:15:35 22 something before I say something, that's a very significant
10:15:41 23 data point.

10:15:41 24 MR. PILEGGI: Yes. If I find out about it, Your
10:15:44 25 Honor, I will promptly notify the Court.

10:15:46 1 THE COURT: That's why we talked about this at
10:15:47 2 the beginning.

10:15:48 3 MR. PILEGGI: So, a lot of things are happening
10:15:50 4 around the country on this, obviously.

10:15:52 5 THE COURT: Right. So, that's the reason why I
10:15:54 6 have lawyers to keep me advised of those things.

10:15:58 7 All right. Go ahead.

10:15:59 8 MR. PILEGGI: Your Honor, I think with the
10:16:00 9 limited time left, I'm just going to focus on the Delaware
10:16:03 10 Constitution, because I don't think my friend intentionally
10:16:06 11 did not -- he did not focus on that regarding --

10:16:08 12 THE COURT: So, yeah. So, limit yourself on
10:16:13 13 this, but go ahead.

10:16:14 14 MR. PILEGGI: I'll try to be brief, but I will
10:16:15 15 limit myself to the Delaware Constitution for the applicable
10:16:20 16 standard of review. Your Honor, I was fortunate to
10:16:23 17 successfully argue both Delaware Supreme Court decisions,
10:16:27 18 the only Delaware Supreme Court decisions that have defined
10:16:30 19 the scope of Article I Section 20 in terms of the right to
10:16:34 20 bear arms outside the home, which is the analog to the
10:16:37 21 Second Amendment, but which, by its terms and as it's been
10:16:40 22 defined by the Supreme Court, is much broader because --

10:16:44 23 THE COURT: Well, so the much broader because
10:16:47 24 the Constitution says, and I forget exactly what, but it
10:16:50 25 says hunting and maybe it says sporting purposes or, I mean,

10:16:53 1 it has things other than self-defense --

10:16:56 2 MR. PILEGGI: Right.

10:16:57 3 THE COURT: -- expressly in it.

10:16:58 4 MR. PILEGGI: Right.

10:16:59 5 THE COURT: So, in that sense, even though

10:17:01 6 Mr. Lehman's argument is that's all covered by the Second

10:17:05 7 Amendment, too, so it makes you kind of wonder. But I take

10:17:08 8 it that, yeah, having express purposes in the Delaware

10:17:13 9 Constitution certainly creates breadth, in my opinion.

10:17:17 10 The question more, though, is or the question
10:17:21 11 that I would have and part of the reason why I was thinking,
10:17:24 12 and this might be a good thing to get the Delaware Supreme
10:17:27 13 Court to address is how much a decision in *Bruen*, which I
10:17:38 14 take it is after these two Delaware Supreme Court decisions,
10:17:43 15 how much that creates uncertainty about what the Delaware
10:17:46 16 Supreme Court would say. And so, that's my concern.

10:17:58 17 MR. PILEGGI: I'd like to address that, if I
10:18:00 18 may, Your Honor. In both the *Doe vs. Wilmington Housing*
10:18:03 19 *Authority* and the *Bridgeville vs. Small* case, the Delaware's
10:18:07 20 high court emphasized the truism which was also observed in
10:18:11 21 the Late Justice Holland's book on the Delaware
10:18:15 22 Constitution. The truism that the U.S. Constitution
10:18:17 23 provides the floor of minimum rights. The States can't
10:18:21 24 provide fewer than those minimum rights, but they can
10:18:24 25 provide greater rights.

10:18:25 1 And that's what Article I Section 20 does. It
10:18:28 2 creates greater rights than the Second Amendment. And those
10:18:32 3 two cases establish beyond question that Article I
10:18:36 4 Section 20 provides greater rights.

10:18:38 5 Now, the State's argument is that the review
10:18:42 6 standard should provide fewer rights. If I understand the
10:18:46 7 State's argument, they're suggesting that notwithstanding
10:18:49 8 *Bruen*, which got rid of the one step too many, got rid of
10:18:53 9 the intermediate scrutiny test, that even though the
10:18:55 10 Delaware Constitution provides greater rights, it should be
10:18:59 11 reviewed based on a more restrictive standard, which I don't
10:19:03 12 think is consistent with *Bruen*. And it's not consistent
10:19:06 13 with the Delaware Supreme Court's view of Article I
10:19:09 14 Section 20 as being -- providing much broader rights.

10:19:12 15 THE COURT: So, the standard review that the
10:19:14 16 Delaware Supreme Court gave in your two cases, how would you
10:19:17 17 describe that?

10:19:18 18 MR. PILEGGI: Intermediate scrutiny.

10:19:20 19 THE COURT: So, my understanding of State
10:19:29 20 Constitutions, generally, I mean, because there's a certain
10:19:32 21 truism to what Justice Holland said, which is if the U.S.
10:19:36 22 Supreme Court guarantees you certain rights, anything the
10:19:41 23 State does can't detract from that amount of protection.

10:19:46 24 MR. PILEGGI: Right. It provides a floor.

10:19:48 25 THE COURT: It is a floor, but that doesn't

10:19:50 1 necessarily mean that, you know -- and I've seen this in the
10:19:56 2 Fourth Amendment context -- that doesn't necessarily mean
10:19:58 3 that every time the Supreme Court refines its mode of
10:20:07 4 analysis of a particular issue, that that now is a part of a
10:20:12 5 refining of the Delaware Constitution.

10:20:16 6 The Delaware Supreme Court historically, you
10:20:20 7 know, based on bits and pieces of information I have, has
10:20:23 8 been very assertive. And I think Justice Holland, in
10:20:37 9 particular perhaps, that, you know, the Delaware
10:20:41 10 Constitution has a different history and, you know, they can
10:20:45 11 do things differently.

10:20:48 12 And so, one of the things that it seems to me is
10:20:52 13 they could continue to do intermediate analysis, say, Look
10:20:56 14 we cover hunting. And what's the other thing?

10:20:59 15 MR. PILEGGI: Recreation.

10:21:00 16 THE COURT: Recreation and the home. Yeah, we
10:21:03 17 cover hunting and recreation. You know, we cover these
10:21:05 18 things that we think are broader because they're explicitly
10:21:09 19 called out, but that doesn't necessarily mean that we now
10:21:14 20 are going to adopt one -- you know, *Bruen* said the Court of
10:21:21 21 Appeals are wrong when they do the two-step analysis.

10:21:26 22 They didn't, because they couldn't, say the
10:21:29 23 Delaware Supreme Court is wrong when it does two-step
10:21:32 24 analysis; right?

10:21:33 25 MR. PILEGGI: You are correct, Your Honor, but

10:21:34 1 maybe I can answer your question by focusing on the part of
10:21:38 2 Article I Section 20 that is identical, the right to bear
10:21:41 3 arms for the protection of self.

10:21:43 4 Based on *Doe* and *Bridgeville*, the Delaware
10:21:48 5 Supreme Court said, We should apply the intermediate
10:21:52 6 scrutiny to any challenges based on Article I Section 20,
10:21:57 7 including the right to bear arms for the protection of one's
10:22:01 8 self inside the home. I think we can all agree that the
10:22:05 9 United States Supreme Court said, That's not the right
10:22:08 10 standard to determine the right to bear arms within the
10:22:11 11 home --

10:22:12 12 THE COURT: So --

10:22:14 13 MR. PILEGGI: -- under *Heller*.

10:22:15 14 THE COURT: So, you would have me or the Third
10:22:26 15 Circuit basically overrule the Delaware Supreme Court?

10:22:28 16 MR. PILEGGI: No, Your Honor. The way I would
10:22:31 17 look at it is let's start with the truism that we all agree
10:22:34 18 with that the United States Supreme Court decides what the
10:22:36 19 floor of minimum rights are when you're --

10:22:39 20 THE COURT: Based on the U.S. Constitution?

10:22:41 21 MR. PILEGGI: Based on the U.S. Constitution.
10:22:43 22 That's the floor. A state can't go below that floor. A
10:22:45 23 state can provide greater rights, but can't provide fewer
10:22:49 24 rights.

10:22:49 25 So, if we start with the overlap of Article I

10:22:52 1 Section 20 with the Second Amendment, the right to keep and
10:22:55 2 bear arms within the home. Let's keep it simple for this
10:22:58 3 purpose, for my purpose. That's an identical right in the
10:23:04 4 Delaware Constitution and the U.S. Constitution.

10:23:07 5 The Delaware Supreme Court pre-*Bruen* said, When
10:23:11 6 we're reviewing these issues, we apply the intermediate
10:23:15 7 scrutiny test. I think it's a fair conclusion after *Bruen*
10:23:19 8 that that would provide fewer rights applying intermediate
10:23:25 9 scrutiny to the right to keep and bear arms within the home.
10:23:28 10 Applying the intermediate scrutiny standard would be more
10:23:31 11 restrictive and would provide fewer rights than applying the
10:23:35 12 *Bruen* standard, which is essentially none of the three tiers
10:23:38 13 of scrutiny. I think that's a fairly safe statement based
10:23:42 14 on *Bruen* and based on Article I Section 20.

10:23:46 15 THE COURT: But you would require me to, I don't
10:23:53 16 know, predict that when the last thing the Delaware Supreme
10:23:58 17 Court has said is, We apply intermediate scrutiny, that in
10:24:01 18 the future they would not do that?

10:24:04 19 MR. PILEGGI: Well, based on -- at least to the
10:24:06 20 extent that there's an overlap of Article I Section 20 to
10:24:10 21 keep --

10:24:11 22 THE COURT: Okay.

10:24:12 23 MR. PILEGGI: At least to that extent.

10:24:13 24 THE COURT: We can quibble on how much it
10:24:15 25 applies to, but the point is you want me to take the last

10:24:20 1 word from the Delaware Supreme Court interpreting the
10:24:23 2 Delaware Constitution and say that the U.S. Supreme Court's
10:24:28 3 interpretation of the U.S. Constitution has changed how the
10:24:37 4 Delaware Supreme Court would analyze this particular
10:24:40 5 provision?

10:24:42 6 MR. PILEGGI: Well, Your Honor, with all due
10:24:43 7 respect, the way I would say it is we're applying the truism
10:24:46 8 that the State cannot provide fewer rights than the U.S.
10:24:51 9 Constitution provides. And by applying the old -- well, by
10:24:55 10 applying the *Doe vs. WHA* standard to that right, we -- the
10:24:59 11 State would be applying or providing fewer rights than the
10:25:03 12 U.S. Supreme Court said are the minimum rights.

10:25:06 13 THE COURT: You know, Mr. Pileggi, the Delaware
10:25:21 14 Constitution doesn't have to have a Second Amendment analog
10:25:24 15 at all; right?

10:25:24 16 MR. PILEGGI: That is correct, Your Honor.

10:25:26 17 THE COURT: And so, if it didn't, they'd be
10:25:28 18 providing fewer rights.

10:25:30 19 MR. PILEGGI: If the Delaware Constitution did
10:25:35 20 not have an analog to the Second Amendment, you wouldn't
10:25:39 21 have -- let's say there was no Article I Section 20.

10:25:42 22 THE COURT: Yeah, yeah. That's what I'm saying.

10:25:44 23 MR. PILEGGI: And before 1987, which is
10:25:45 24 relatively recent for historical purposes, that's when
10:25:49 25 Article I Section 20 was passed, there was none. So, let's

10:25:51 1 say we're in 1985. There is no Article I Section 20. And
10:25:55 2 let's say *Bruen* came out in 1985.

10:25:58 3 Well, or *Heller* came out in 1985. At the very
10:26:03 4 least, Delaware residents would have the right to keep a
10:26:06 5 handgun in their home for self-defense.

10:26:08 6 THE COURT: Sure. Sure. Yeah, yeah, because of
10:26:09 7 the U.S. Constitution, but not because of the Delaware
10:26:11 8 Constitution.

10:26:11 9 MR. PILEGGI: Right, but to complete the
10:26:13 10 analogy, the Delaware Supreme Court couldn't come out in
10:26:16 11 1986 and say, You're not allowed to have a firearm in your
10:26:19 12 home for self-defense because there's nothing in the
10:26:21 13 Delaware Constitution.

10:26:22 14 THE COURT: Right. They would not be
10:26:24 15 interpreting the Delaware Constitution. They'd just be
10:26:27 16 applying U.S. Constitutional law.

10:26:28 17 MR. PILEGGI: Right. So, let's fast forward to
10:26:30 18 1989, Article I Section 20.

10:26:32 19 THE COURT: Yeah, yeah. So, I don't think this
10:26:33 20 is --

10:26:34 21 MR. PILEGGI: Okay.

10:26:34 22 THE COURT: I understand what you're saying.
10:26:36 23 I'm pretty sure I disagree with it --

10:26:37 24 MR. PILEGGI: Okay.

10:26:38 25 THE COURT: -- so I don't think it's productive

10:26:41 1 to talk about this anymore.

10:26:43 2 So, what I'm thinking, Mr. Pileggi, is I'll give
10:26:47 3 you another five minutes, period, then we're going to take a
10:26:50 4 break, and then we'll switch over to the State. Okay?

10:26:52 5 MR. PILEGGI: Yes, Your Honor. Fine. Thank
10:26:54 6 you.

10:26:54 7 In the five minutes I have left then, I'd like
10:26:56 8 to talk about the difference between automatic and
10:26:59 9 semi-automatic. In another case that I was successful in
10:27:03 10 arguing, the *Delaware State Sportsmen's Association vs.*
10:27:07 11 *Garvin*, there are two cases by that name. There's a 2018
10:27:10 12 case and there's a 2020 case. I'm referring to the 2020
10:27:10 13 case.

10:27:15 14 In the 2020 case that we won and the State did
10:27:18 15 not appeal, the Superior Court in that decision disagreed
10:27:21 16 with the State. In that case, the State was trying to
10:27:25 17 conflate the difference between an automatic weapon and a
10:27:29 18 semi-automatic weapon.

10:27:31 19 And I respectfully suggest they're doing the
10:27:34 20 same thing in this case. They're trying to blur the
10:27:36 21 distinction, the very important distinction, between an
10:27:39 22 automatic firearm and a semi-automatic firearm. And the
10:27:43 23 best --

10:27:43 24 THE COURT: And the firearms that we're talking
10:27:46 25 about here, they're all semi-automatic; right?

10:27:49 1 MR. PILEGGI: Correct. But in their briefing,
10:27:51 2 Your Honor, and it came up a little bit in your colloquy
10:27:54 3 with my friend, they keep referring to machine guns, which
10:27:59 4 everyone knows are banned, and nobody in this case is
10:28:02 5 arguing are covered under the Second Amendment. We might as
10:28:05 6 well be talking about rocket-propelled grenades because that
10:28:09 7 is not something that is covered. We're not arguing that
10:28:13 8 it's covered.

10:28:13 9 THE COURT: Well, no, no. So, part of the
10:28:15 10 reason, because I think I was the one who introduced machine
10:28:18 11 guns or, for that matter, sawed-off shotguns, you know, I
10:28:26 12 understand they are not at issue in this case. But one of
10:28:31 13 the things that I'm trying to do is to, for lack of a better
10:28:43 14 word, try to consider the broader scope than just what's
10:28:48 15 exactly at issue in this case because I think -- you know, I
10:28:55 16 may change my mind about this -- but I think there's a lot
10:29:15 17 of uncertainty about exactly what the Supreme Court's
10:29:25 18 decisions, what the implications are of those for much of
10:29:31 19 anything other than handguns.

10:29:34 20 And I think there's a lot of things just in the
10:29:42 21 opinion that kind of go this way, kind of go that way or at
10:29:46 22 least maybe they don't, but there's suggestions. And you
10:29:57 23 know, Justice Alito, Justice Kavanaugh, Chief Justice
10:30:09 24 Murray, Justice Kavanaugh. You know, Justice Kavanaugh and
10:30:12 25 the Chief Justice said, Properly interpreted, the Second

10:30:16 1 Amendment allows a variety of gun regulations. As we've
10:30:30 2 explained, the sorts of weapons protected were those in
10:30:33 3 common use at the time. We think that limitation is fairly
10:30:42 4 supported by the historic tradition of prohibiting the
10:30:46 5 carrying of dangerous and unusual weapons.

10:30:48 6 Justice Alito said, Our holding today in *Bruen*
10:30:59 7 decides nothing about the kinds of weapons that people may
10:31:04 8 possess.

10:31:12 9 And so, that's the reason why I'm asking
10:31:19 10 questions, maybe all over the lot, because I'm interested in
10:31:25 11 more, though I don't really have any power to say anything
10:31:29 12 about it, than just the particular two pieces of legislation
10:31:34 13 that are what is the subject of today's hearing.

10:31:39 14 In any event, I'm sorry for that digression. Go
10:31:42 15 ahead.

10:31:42 16 MR. PILEGGI: No. I'll just conclude with this,
10:31:44 17 Your Honor, because I don't want to extend -- I don't want
10:31:46 18 to use up more time than Your Honor has given me. I'll just
10:31:50 19 close with one statement.

10:31:51 20 In that *Garvin* -- excuse me, in that *Delaware*
10:31:55 21 *State Sportsmen's Association vs. Garvin*, the 2022 case --
10:31:58 22 2020 case, the Superior Court disagreed with the State's
10:32:02 23 attempt to say there's no real important distinction between
10:32:06 24 automatic weapons and semi-automatic weapons. They tried to
10:32:08 25 conflate the two. And I think they're trying to do the same

10:32:11 1 thing here.

10:32:12 2 And my point is there's an extremely important,
10:32:15 3 well-established distinction. And the best example of that
10:32:19 4 is automatic weapons, like machine guns, have been banned.
10:32:23 5 They're still banned. And nobody in this case is suggesting
10:32:27 6 they shouldn't be banned.

10:32:28 7 Semi-automatic weapons have never enjoyed a
10:32:32 8 tradition of regulation consistent with *Bruen*. And that's
10:32:37 9 why the distinction between semi-automatic and automatic
10:32:41 10 weapons for this case is an important distinction, as was
10:32:45 11 recognized in *Garvin*.

10:32:48 12 Thank you, Your Honor.

10:32:48 13 THE COURT: Besides for machine guns, what other
10:32:51 14 kind of fully automatic weapon is there?

10:32:53 15 MR. PILEGGI: Well, Your Honor, the best answer
10:32:56 16 to that question is there are a lot of modifications you can
10:33:00 17 make. The machine gun is the best example. But if Your
10:33:06 18 Honor wants, I can submit a long list of examples. That's
10:33:11 19 the best example, but there are weapons -- there are
10:33:13 20 modifications you can make to a weapon to make it automatic,
10:33:17 21 but that's the most common example.

10:33:19 22 But none of the weapons that are banned here in
10:33:23 23 this legislation that we're challenging are anything other
10:33:26 24 than -- excuse me -- no one suggests they're anything other
10:33:29 25 than semi-automatic.

10:33:30 1 THE COURT: Right.

10:33:32 2 MR. PILEGGI: And the most common example --

10:33:34 3 THE COURT: Are there any other presently banned
10:33:39 4 weapons that are -- you said machine gun is the most common.
10:33:46 5 What's in second place; do you know?

10:33:48 6 MR. PILEGGI: Well, Your Honor, I think my
10:33:50 7 understanding is that the best way to -- instead of trying
10:33:53 8 to think of an example, whether it's a Tommy gun or
10:33:56 9 something, is to apply the definition. As I understand it,
10:33:59 10 an automatic weapon is when you pull the trigger, bullets
10:34:04 11 will continue to fire as long as your finger is on that
10:34:06 12 trigger. Semi-automatic, you have to pull the trigger each
10:34:09 13 time you want a bullet to fire.

10:34:12 14 THE COURT: Right.

10:34:13 15 MR. PILEGGI: That's the best and it's a
10:34:16 16 simplistic definition.

10:34:17 17 THE COURT: And so, maybe --

10:34:18 18 MR. PILEGGI: So, if you want a definition of
10:34:21 19 whether or not -- which one of those definitions applies as
10:34:24 20 opposed to the name of the firearm, because I think many
10:34:27 21 firearms can be modified and adapted to fit one or two of
10:34:31 22 those -- either one of those definitions. I don't know if
10:34:35 23 that answers your question or not.

10:34:36 24 THE COURT: No, actually that's helpful. Thank
10:34:38 25 you.

10:34:42 1 So, one of the things about the large-capacity
10:34:45 2 magazine that was in the briefing was because the cutoff
10:34:52 3 here is 17; right?

10:34:55 4 MR. PILEGGI: Correct.

10:35:00 5 THE COURT: If the large-capacity magazine ban
10:35:09 6 was upheld, would there be any firearms that could no longer
10:35:14 7 be used?

10:35:17 8 MR. PILEGGI: Your Honor, that's a good
10:35:19 9 question. And there are so many different types of firearms
10:35:22 10 out there, I'd hesitate to give you a definitive answer for
10:35:26 11 all firearms. Excuse me. I'll keep my hands in my pocket.
10:35:32 12 But I do think a statistic would be helpful. It might help
10:35:36 13 to inform the answer to that question.

10:35:40 14 THE COURT: But before you give me that, just in
10:35:43 15 terms of, Yes, Judge, here's one firearm that only works
10:35:49 16 with a magazine that's goes above 17, you can't name one
10:35:57 17 right now?

10:35:57 18 MR. PILEGGI: I can't name one, but I'd be happy
10:36:00 19 to supplement by the end of the day the answer to that
10:36:03 20 question.

10:36:03 21 THE COURT: Okay. So, what were you going to
10:36:06 22 say?

10:36:06 23 MR. PILEGGI: In Page 16 of our reply brief, we
10:36:09 24 cite to a 2022 report that indicates that 52 percent of
10:36:14 25 modern sporting rifles in this country have magazines with a

10:36:18 1 capacity of 30 rounds. So, in partial response to Your
10:36:23 2 Honor's question, whether or not those firearms could be
10:36:26 3 used, somebody would have to go out and buy -- either buy a
10:36:30 4 new magazine or try to retrofit their firearm to find a
10:36:35 5 magazine, if they could, that would fit their firearm for a
10:36:40 6 majority of the modern sporting rifles in this country.
10:36:46 7 That's a pretty big statistic.

10:36:53 8 If you want, Your Honor, I can supplement to
10:36:55 9 make sure I get an answer --

10:36:56 10 THE COURT: Well, I mean, if you've got -- so,
10:37:01 11 if you've got some example of a firearm that can't operate
10:37:10 12 unless it has a magazine that has at least 18 rounds, yeah,
10:37:17 13 if you'd send me a letter saying what that is and how we
10:37:20 14 know that's true, that would be helpful. You don't have to
10:37:24 15 do it by the end of the day, but probably by the end of
10:37:31 16 Monday would be helpful.

10:37:32 17 MR. PILEGGI: Okay, Your Honor. I will make
10:37:34 18 sure I send you that letter, one way or another, based on --

10:37:37 19 THE COURT: Okay. That would be great.

10:37:39 20 MR. PILEGGI: Okay.

10:37:40 21 THE COURT: Hold on a second, Mr. Pileggi.

10:38:09 22 Mr. Lehman said there are 10 million plus or minus firearms
10:38:19 23 out there that probably meet the legislation's definition of
10:38:25 24 what's banned in the assault rifle, assault pistol
10:38:30 25 categories.

10:38:34 1 Is there any information about -- I think maybe
10:38:44 2 you just gave it to me. Is half the magazines that are sold
10:38:50 3 each year for or I wrote down here, 50 percent of the
10:38:58 4 magazines sold in 2022, but I guess I'm missing what that
10:39:02 5 goes with, were 30 rounds or more.

10:39:07 6 MR. PILEGGI: I can answer that in two parts,
10:39:10 7 Your Honor, just to make it clear. On Page 16 of our reply
10:39:14 8 brief, we refer to a 2022 report that 52 percent of modern
10:39:19 9 sporting rifles have magazines with a capacity of 30 rounds.

10:39:23 10 THE COURT: When you say "have," you mean are
10:39:24 11 sold sort of in conjunction with?

10:39:26 12 MR. PILEGGI: In existence today based on sales
10:39:30 13 in the past. But the other thing I want to point out in
10:39:33 14 answer to your question, Your Honor, is --

10:39:35 15 THE COURT: So, if one were approximating, if
10:39:41 16 there's 10 million of these sorts of weapons out there,
10:39:47 17 maybe a reasonable estimate is 50 percent of them have a
10:39:51 18 large-capacity magazine within the meaning of the law?

10:39:55 19 MR. PILEGGI: Based on that statistic, but there
10:40:00 20 are a lot of other statistics. And if I can just refer to
10:40:03 21 our reply brief, Your Honor, at Pages 9 and 10 of our reply
10:40:08 22 brief, there are a lot of other statistics. For example, we
10:40:11 23 cite to a National Shooting Sports Foundation Report that
10:40:18 24 ten years ago one out of every -- well, let me be more
10:40:23 25 specific. We're talking about how many of these are out

10:40:25 1 there, and there are a lot of statistics in our reply brief.
10:40:29 2 I'm just trying, in the interest of time, to pick one
10:40:35 3 because I know that there are many statistics out there, and
10:40:40 4 I don't want to bore you with statistics.

10:40:42 5 But how about if I leave you with this: In the
10:40:45 6 Ninth Circuit in *Duncan vs. Becerra*, and there are a lot of
10:40:48 7 cases with that name. This is a 2020 decision. In that
10:40:51 8 case, which was later vacated en banc, but not for this
10:40:55 9 purpose, a panel of the Ninth Circuit observed that one of
10:40:58 10 the banned rifles, the AR-15 is the most popular rifle in
10:41:03 11 America today and comes standard with a 30-round magazine.
10:41:07 12 So, that doesn't give you a specific number, but at least
10:41:10 13 according to a panel of the Ninth Circuit in that case, the
10:41:14 14 most popular rifle in America today comes standard with a
10:41:17 15 30-round magazine. So --

10:41:19 16 THE COURT: Okay. Well, that's actually very
10:41:22 17 helpful.

10:41:22 18 MR. PILEGGI: And I know you don't want me to
10:41:24 19 take up any more time, Your Honor, but our reply brief does
10:41:27 20 cite a lot of statistics about how many millions of rifles
10:41:30 21 are out there.

10:41:31 22 THE COURT: Okay. All right.

10:41:32 23 Thank you, Mr. Pileggi.

10:41:33 24 MR. PILEGGI: Thank you, Your Honor.

10:41:34 25 THE COURT: All right. So, we'll take a 10 or

10:41:38 1 15 -- let's take a 15-minute break.

10:41:41 2 And, Mr. Ross, you know, I'm not going to limit
10:41:46 3 you to an hour here or your side to an hour because, for one
10:41:50 4 thing, I've given them probably an hour and a half already.
10:41:54 5 So, for what it's worth.

10:41:58 6 Okay?

10:41:59 7 MR. ROSS: Thank you, Your Honor.

10:42:00 8 THE COURT: All right. We'll be in recess.

10:42:01 9 (A brief recess was taken.)

10:42:01 10 DEPUTY CLERK: All rise.

10:59:30 11 THE COURT: All right. Mr. Ross.

10:59:36 12 MR. ROSS: Thank you, Your Honor. Two
10:59:38 13 housekeeping matters before we get into the substance. If
10:59:40 14 Your Honor still needs the case number for *Graham*, we have
10:59:43 15 it handy for Your Honor.

10:59:44 16 THE COURT: Just tell me what it is. I don't
10:59:46 17 think it matters.

10:59:46 18 MR. ROSS: 23-00033.

10:59:49 19 THE COURT: Okay.

10:59:51 20 MR. ROSS: Secondly, Your Honor, we have some
10:59:52 21 slides. I don't know that we'll get through all of them.
10:59:55 22 We'll have them up on the screen. We also have a printout
10:59:57 23 of them if it would be helpful for Your Honor to have a
11:00:00 24 printout.

11:00:00 25 THE COURT: Sure.

11:00:01 1 MR. ROSS: May I approach to hand up copies?

11:00:04 2 THE COURT: Sure.

11:00:15 3 MR. ROSS: Thank you, Your Honor. May it please
11:00:16 4 the Court.

11:00:16 5 After nearly 50 pages of briefing and about an
11:00:20 6 hour and a half of argument, it's clear that the Plaintiffs'
11:00:24 7 argument on the constitutional issue reduces to the
11:00:28 8 following proposition. There are millions of assault
11:00:32 9 weapons and large-capacity magazines in the United States;
11:00:35 10 and therefore, they can't be banned under *Bruen*.

11:00:37 11 You see it in a lot of places in the briefing.
11:00:40 12 We've heard it today. And I think perhaps most clearly --

11:00:43 13 THE COURT: Right. I think Mr. Lehman was
11:00:46 14 pretty clear if it's -- I think that is the -- obviously,
11:00:53 15 there's more to it, but yeah, if it's not dangerous and
11:00:58 16 unusual, and it's not unusual because there's 10 million of
11:01:03 17 them, it's over.

11:01:05 18 MR. ROSS: That's right, Your Honor. We see
11:01:08 19 that in the briefing. We've heard it today. And we believe
11:01:11 20 that oversimplified approach fundamentally misconstrues the
11:01:16 21 relevant law. We believe that this claim starts from that
11:01:19 22 faulty premise. They've offered almost no evidence in
11:01:24 23 support of their position. And the little evidence that
11:01:27 24 they've offered fails in comparison to our evidence.

11:01:30 25 I would note there was discussion --

11:01:32 1 THE COURT: I mean, it's fair to characterize
11:01:34 2 their view as the two pieces of legislation are facially
11:01:38 3 valid; right?

11:01:39 4 MR. ROSS: Because, yes, for one reason, which
11:01:42 5 is that there are -- two reasons. There are a lot of
11:01:46 6 assault weapons, and there are a lot of large-capacity
11:01:49 7 magazines.

11:01:50 8 THE COURT: Right, right. But, I mean, if
11:01:51 9 they're right, that's all that they need to do?

11:01:54 10 MR. ROSS: Unquestionably, if that's all that's
11:01:56 11 relevant, they've gotten there. But as we believe it's
11:02:00 12 clear from *Bruen*, and Mr. Moritz will talk in detail about
11:02:05 13 *Bruen*, that the analysis requires far more facts than that.

11:02:10 14 There was discussion during counsel's argument
11:02:13 15 about the motivation for the Bowie gun laws, the motivation
11:02:19 16 for the Tommy gun laws. There's no evidence from the
11:02:24 17 Plaintiffs on any of that. Their flawed analysis and
11:02:28 18 absence of evidence, we believe, means they're not entitled
11:02:31 19 to an injunction.

11:02:32 20 So, briefly, a roadmap on what we plan to do
11:02:34 21 today, Your Honor.

11:02:34 22 THE COURT: Actually, they may not have, but
11:02:38 23 like the idea that the Bowie knife law was in response to
11:02:44 24 crime, isn't that what your expert said?

11:02:46 25 MR. ROSS: Yes, but what he -- all counsel said

11:02:50 1 is it was done because it was perceived that it was used by
11:02:53 2 criminals. That's the entirety of their facts. We believe
11:02:56 3 there's --

11:02:58 4 THE COURT: Yeah, but that seems to be -- the
11:03:02 5 sawed-off shotgun, that's what the Supreme Court said;
11:03:05 6 right?

11:03:06 7 MR. ROSS: It is part of the analysis, Your
11:03:08 8 Honor. It is not, however, the beginning and the end of the
11:03:11 9 analysis. So, what we would plan to do today, and we're
11:03:14 10 going to tweak some of this, because we've heard Your Honor
11:03:17 11 is I'm going to talk about the factual record and the issue
11:03:19 12 of whether or not large-capacity magazines are arms.
11:03:22 13 Mr. Moritz is going to discuss the Second Amendment
11:03:24 14 framework and the arguments. And I'll discuss the Delaware
11:03:28 15 Constitution. And unless Your Honor has questions, we've
11:03:30 16 heard you, and we don't plan to discuss the other factors on
11:03:33 17 the preliminary injunction.

11:03:36 18 We believe that the questions before the courts
11:03:38 19 dealing with these types of cases is highly fact dependent.
11:03:41 20 It's why we submitted five declarations, nearly 200 pages,
11:03:45 21 39 exhibits for the experts and another 16 on our brief. We
11:03:50 22 believe that sort of detailed factual analysis is required
11:03:52 23 by *Bruen*. And, indeed, it's consistent with what other
11:03:57 24 courts around the country are doing. And I'm not going to
11:03:59 25 spend time cataloging them, but I do think one very recent

11:04:02 1 Order is useful, and the exchange here is on Slide 3.

11:04:08 2 This is the case of *Cheeseman vs. Platkin*, which
11:04:11 3 is in the District of New Jersey. The case number is
11:04:17 4 1:22-cv-4360. Multiple cases are pending in the District
11:04:23 5 Court in New Jersey challenging New Jersey's assault weapon
11:04:27 6 statute, and the State moved to consolidate.

11:04:30 7 Mr. Cheeseman, represented by Plaintiffs'
11:04:32 8 counsel, opposed consolidation. And on the left side, we
11:04:36 9 have an excerpt for why he didn't think consolidation was
11:04:39 10 necessary. He said, Because there's really only two
11:04:41 11 questions. One, are they bearable arms? And two, are they
11:04:44 12 in common use? It's the same basic two-part test we've
11:04:48 13 heard today.

11:04:48 14 On February 3rd, the Court rejected it, and we
11:04:53 15 have excerpts from the ruling on the right. The historical
11:04:56 16 evidence, which is the central issue here, needed to be
11:05:00 17 developed in the case. And the Court consolidated in order
11:05:04 18 to develop the historical evidence in discovery.

11:05:07 19 Now, this was issued ten days before the
11:05:09 20 Plaintiffs filed their reply brief, and yet they elected to
11:05:13 21 stay with the same argument that the Court found
11:05:16 22 unpersuasive there.

11:05:17 23 THE COURT: Well, of course, I mean, with due
11:05:19 24 respect to my colleagues in New Jersey, they believe that
11:05:26 25 they are right. They don't have to change just because a

11:05:28 1 District Court judge in New Jersey said otherwise.

11:05:32 2 MR. ROSS: They're entitled to proceed as they
11:05:34 3 like. We think, though, it is insightful and instructive on
11:05:38 4 the question of whether or not this argument is the extent
11:05:41 5 of the analysis. It doesn't mean they have to change their
11:05:44 6 view.

11:05:45 7 THE COURT: And, also, I mean, part of the
11:05:47 8 reason why -- because they essentially had the same issue at
11:05:50 9 some point ago in this case when we were talking about the
11:05:53 10 schedule. And it seemed to me that being certain that if
11:06:01 11 they lost, they would appeal. And thinking there was some
11:06:04 12 possibility if you lost, you would appeal. That it would be
11:06:11 13 good to have a record, which I was in no position at the
11:06:17 14 time to definitively say one way or the other just because
11:06:22 15 the Court of Appeals might appreciate a record.

11:06:25 16 MR. ROSS: Understood. Of course. And I
11:06:28 17 recognize the Court doesn't prejudge anything when, for
11:06:31 18 example, it orders consolidation. If the Plaintiffs' theory
11:06:35 19 is correct, though, then the record of historical regulation
11:06:40 20 is actually basically irrelevant because for them the
11:06:42 21 entirety of the analysis is millions, it's over.

11:06:46 22 THE COURT: No.

11:06:47 23 MR. ROSS: I recognize no one has decided that
11:06:49 24 yet.

11:06:49 25 THE COURT: I think they would agree with you on

11:06:51 1 that.

11:06:52 2 MR. ROSS: Right. And Mr. Moritz will explain,
11:06:53 3 when he's talking about the Second Amendment analysis, why
11:06:56 4 we think it's fundamentally different.

11:06:57 5 Now, because of that choice, which is obviously
11:06:59 6 their choice to make, substantially all of the factual
11:07:03 7 evidence, which we believe is important, is uncontested.
11:07:07 8 And there's not time today and I'm not going to go through
11:07:09 9 all of that.

11:07:10 10 THE COURT: Well, I mean, I asked that question
11:07:12 11 at the beginning, and they concede that.

11:07:14 12 MR. ROSS: Yeah. Nevertheless, I think to
11:07:16 13 understand the Second Amendment analysis, we believe it is
11:07:19 14 highly fact dependent. I do want to touch briefly on some
11:07:23 15 of the key undisputed facts. And there are a few facts
11:07:26 16 where the parties do seem to join issue, and I would like to
11:07:29 17 spend a few minutes on this.

11:07:30 18 THE COURT: All right.

11:07:30 19 MR. ROSS: So, first, let's talk about the
11:07:32 20 statutes, what they are. Your Honor has talked about HB 450
11:07:38 21 SS 1 for SB 6. HB 450 bans the 44 semi-automatic assault
11:07:46 22 long guns, 19 semi-automatic assault pistols.

11:07:50 23 In response to Your Honor's question about the
11:07:52 24 pistols, we had time to do a little bit of additional
11:07:55 25 looking at the break. And I know that at least one of the

11:07:58 1 articulated models also has a fully automatic version
11:08:02 2 available, but we don't have sort of full evidence on that.

11:08:05 3 What is uncontested is that there are numerous
11:08:09 4 handguns, rifles, shotguns, including semi-automatic ones,
11:08:14 5 that are not covered by the statute. They're not banned,
11:08:18 6 including types of guns that have been referred to as
11:08:22 7 commonly used for self-defense like the handgun. And
11:08:24 8 there's no claim to the contrary from the Plaintiffs.

11:08:27 9 THE COURT: I mean, based on nothing other than
11:08:33 10 my own experience, I would estimate the number of
11:08:37 11 semi-automatic handguns to greatly exceed 10 million in this
11:08:43 12 country, but I have no idea what that is. I mean, the ones
11:08:46 13 that are not banned.

11:08:47 14 MR. ROSS: Right. That's exactly right, Your
11:08:49 15 Honor. There is a category that, specifically the
11:08:52 16 enumerated ones, and then those that meet the definition of
11:08:55 17 copycat which are banned. But it is uncontested that there
11:08:58 18 are an enormous number of weapons that are not affected by
11:09:01 19 the statute.

11:09:03 20 With respect to SS 1 for SB 6 -- and I should
11:09:07 21 note before I move on, there are also certain exceptions in
11:09:10 22 the statute, including weapons that were owned before.
11:09:13 23 There's a qualified law enforcement officer exception.

11:09:15 24 With respect to the magazines, what are banned
11:09:18 25 are magazines that can hold more than --

11:09:20 1 THE COURT: But while you note there are these
11:09:22 2 exceptions, whether or not there's a law enforcement officer
11:09:27 3 exception or whether or not there's a grandfather clause,
11:09:35 4 aren't they irrelevant to the constitutional issue?

11:09:38 5 MR. ROSS: So, I don't believe they are
11:09:42 6 irrelevant for a few reasons. First of all, at the federal
11:09:48 7 level, we believe the right that's at issue, the right with
11:09:51 8 respect to the Second Amendment, concerns weapons in common
11:09:54 9 use for the purpose of self-defense. And we believe that,
11:09:58 10 as you think about that, we have not only shown through the
11:10:02 11 evidence in the record so far that these aren't those, but
11:10:05 12 we've explained that those weapons are unaffected.

11:10:09 13 With respect to the Delaware Constitutional
11:10:11 14 issue, which I'll get to, it's important to note that the
11:10:14 15 two cases that the Plaintiffs rely upon were both complete
11:10:19 16 and total ban cases. No gun ownership whatsoever in the
11:10:23 17 common area of apartments. And subject to a few hunting
11:10:26 18 licenses, no guns possessed in State Parks. They were
11:10:30 19 referred to as total bans.

11:10:32 20 These statutes -- neither of these statutes is a
11:10:36 21 total ban. And so, when you think about the appropriate
11:10:39 22 framework for Delaware, which we'll get to, it matters,
11:10:42 23 according to the Delaware Supreme Court, how you think about
11:10:45 24 the appropriate standard of review.

11:10:47 25 The large-capacity magazine statute bans

11:10:54 1 magazines that can hold more than 17 rounds. It happens to
11:10:57 2 be higher than the limitations in many of the other statutes
11:11:00 3 around the country. Importantly, no claim, and this goes to
11:11:06 4 a question that Your Honor had, and I'll get into it in a
11:11:09 5 little bit more in a couple minutes -- no claim that
11:11:14 6 upholding the large-capacity magazine ban would render any
11:11:19 7 weapon whatsoever inoperable.

11:11:21 8 THE COURT: That's where things stand right now,
11:11:22 9 but I am giving Mr. Pileggi a chance to tell me otherwise.

11:11:27 10 MR. ROSS: Understood. And we'll take it up --
11:11:29 11 as of this morning when we walked in and to date, there's
11:11:32 12 been no claim. If they want to make an argument, we will
11:11:35 13 deal with it.

11:11:35 14 But it's clear that neither of these is a
11:11:38 15 categorical ban. And the Plaintiffs in Footnote 1 of the
11:11:41 16 reply talk about the analysis "in the context of bans."

11:11:46 17 THE COURT: And I'm sorry, but you also say
11:11:48 18 there are no categorical bans, but I believe, either you or
11:11:53 19 Mr. Moritz, said when I asked at the beginning if the
11:11:57 20 legislature passed a categorical ban, would anything be
11:12:00 21 different, and the answer was no; right?

11:12:03 22 MR. ROSS: I think I answered the question. I'm
11:12:08 23 not sure. If that was the question as to whether or not the
11:12:11 24 analysis would change if it's a categorical ban, I thought
11:12:14 25 there was a question about how the application of a broader

11:12:19 1 group of guns, but I didn't understand you to be talking
11:12:22 2 about a complete categorical ban of all guns.

11:12:24 3 THE COURT: Well, no. The question was, and
11:12:26 4 maybe I didn't frame it right, but it was: The assault
11:12:36 5 weapons, 450, HB 450 is prospective. And essentially, I
11:12:43 6 didn't use the word retroactive, but if you made it
11:12:46 7 retroactive and, you know, would that be a problem under the
11:12:49 8 Second Amendment? And I thought the answer was no.

11:12:52 9 MR. ROSS: Correct, because even going
11:12:54 10 backwards, it's not a category. It doesn't change the fact
11:12:57 11 whether you're looking forwards or backwards. This is not a
11:13:00 12 categorical ban.

11:13:01 13 THE COURT: Well, actually I meant the
11:13:03 14 categories that are in the statute.

11:13:05 15 MR. ROSS: Yes. And the categories that are in
11:13:07 16 the statute are not categorical bans. They're specifically
11:13:11 17 enumerated weapons, and then a definition of other guns that
11:13:16 18 may not have the name, but have the features.

11:13:20 19 THE COURT: Right. So, we're actually just
11:13:22 20 disagreeing on what it means to be categorical.

11:13:25 21 What I meant, and I'm thinking you're not
11:13:27 22 actually disagreeing with, is if those particular weapons
11:13:30 23 were banned retroactively, that would not present a
11:13:34 24 different issue.

11:13:35 25 MR. ROSS: That is correct, Your Honor.

11:13:37 1 THE COURT: Okay. Now, we understand each
11:13:39 2 other.

11:13:40 3 MR. ROSS: I'm sorry?

11:13:41 4 THE COURT: We understand each other.

11:13:42 5 MR. ROSS: Okay. And what I was meaning to say
11:13:44 6 when I was talking about a categorical ban is that there is
11:13:48 7 no claim that, for example, unlike the Delaware cases, all
11:13:54 8 firearms or even all members of a category of firearms are
11:13:59 9 banned by the statute. We're talking about specifically an
11:14:02 10 enumerated set with guns. And it leaves many --

11:14:07 11 THE COURT: Well, so are there assault rifles
11:14:10 12 that are not banned by this statute?

11:14:12 13 MR. ROSS: So, there are semi-automatic weapons.
11:14:18 14 Long -- I don't want to avoid the question, but it would
11:14:22 15 depend upon how you define an assault rifle, but there
11:14:25 16 are --

11:14:26 17 THE COURT: Well, maybe a way to say this is:
11:14:33 18 Is there something that would fit within the definition -- I
11:14:37 19 can't remember now whether HB 450 has a definition or
11:14:40 20 whether it's just a list of particular manufacturers and
11:14:43 21 copycats. Are there other "semi-automatic assault long
11:14:54 22 guns" that are not banned?

11:14:57 23 MR. ROSS: So, I want to be -- I want to answer
11:14:59 24 the question. So, no, in the sense that semi-automatic
11:15:04 25 assault long gun is a defined term in the statute. There

11:15:07 1 are -- if we move away from the statutory nomenclature,
11:15:11 2 there are long, like rifle, semi-automatic weapons. Like
11:15:17 3 there can -- my understanding is semi-automatic hunting
11:15:20 4 rifle is a long -- you know, it would have a length that is
11:15:23 5 similar. It would be semi-automatic. It is not banned.

11:15:27 6 So, it is, as Your Honor suggested in his
11:15:32 7 question, a statute that doesn't say every gun that simply
11:15:36 8 meets these criteria are banned, and that's how we get
11:15:39 9 there. It says, Here's a list of specifically enumerated
11:15:42 10 assault long guns, a list of specifically enumerated assault
11:15:46 11 pistols, and then copycat weapons which are specifically
11:15:50 12 defined as weapons which have the following characteristics.

11:15:53 13 So, let's talk a little bit more about the
11:16:00 14 banned guns. It's uncontested on the record that what we're
11:16:04 15 talking about are guns that have military origins. And I
11:16:07 16 understand from the discussion this morning, simply having
11:16:10 17 the origin there, you can go a lot of different ways.

11:16:12 18 Let's talk about the specific ways these guns
11:16:15 19 have gone. What they have done is retained nearly all of
11:16:18 20 the features of the military weapons. They have
11:16:21 21 interchangeable parts. And the only difference that's been
11:16:25 22 identified is that they fire semi-automatically versus fully
11:16:30 23 automatically.

11:16:31 24 And I want to come back to that. But what we're
11:16:34 25 going to see is that because of the similarity in features

11:16:38 1 with their military counterparts, they share features that
11:16:41 2 make these guns incredibly lethal. It's uncontested, these
11:16:45 3 guns are actually marketed as being weapons of war. We have
11:16:48 4 some of the advertisements in the record. And actually, if
11:16:53 5 you look at the -- it's hard to read, but the Daniel Defense
11:16:58 6 advertisement on the right for a civilian weapon, the very
11:17:02 7 bottom talks about the fact that this gun is useful at home
11:17:06 8 or whether you're patrolling a foreign land -- and if we can
11:17:09 9 blow back out -- with a picture of a soldier. This is how
11:17:13 10 they are marketed.

11:17:14 11 So, let's talk about the history of one of these
11:17:16 12 just to help better understand. We can't get through all
11:17:19 13 63, and we'll use the one that Plaintiffs' counsel talked
11:17:22 14 about, the AR-15, which has been described by the Fourth
11:17:26 15 Circuit accurately as the semi-automatic version of the M16
11:17:30 16 developed for the military.

11:17:31 17 And if we could go to Slide 8. This is a field
11:17:35 18 test. It's formerly classified.

11:17:38 19 THE COURT: I saw this stuff about, you know,
11:17:41 20 killing Vietnamese, and blowing their arms off and big holes
11:17:46 21 here and there. I understand that they -- at least some of
11:17:50 22 these have a capacity to be more dangerous or more lethal,
11:18:02 23 maybe even unnecessarily more lethal than other guns.

11:18:09 24 THE COURT: So, I don't know. Go ahead, but I
11:18:12 25 don't -- I'm not sure how actually relevant this is.

11:18:18 1 MR. ROSS: Sure. So, I want to speak to the
11:18:22 2 record and answer Your Honor's question. We don't need to
11:18:25 3 roll through these.

11:18:26 4 One of the limited areas where there is
11:18:28 5 disagreement between the parties is in the suitability and
11:18:32 6 relative validity of these weapons versus other weapons.
11:18:37 7 And we do believe it is relevant because we do think the
11:18:40 8 dangerousness question matters.

11:18:43 9 And what this evidence goes to is the fact that
11:18:45 10 these guns are more dangerous in comparison to other weapons
11:18:51 11 that are out there. These weapons are more dangerous than,
11:18:55 12 for example, the handguns.

11:18:59 13 THE COURT: Right. And I think generally
11:19:02 14 speaking, yeah, you've kind of -- I forget what the name of
11:19:06 15 your expert was, but Mr. Yurgealitis, but whoever it was,
11:19:12 16 you know, that on the whole, the banned weapons or the
11:19:26 17 banned assault weapons have more fire power than non-banned
11:19:38 18 weapons generally. I wouldn't say that was -- my impression
11:19:46 19 is that's not actually disputed.

11:19:48 20 MR. ROSS: Okay. Well, if it's not disputed,
11:19:52 21 we'll move on. I will just note, so that we're clear, on
11:19:55 22 Page 7 of both of the opening briefs, there is a suggestion,
11:19:58 23 particularly because of the fact they say that when they're
11:20:01 24 used with .223-caliber ammunition, they're not particularly
11:20:04 25 dangerous. They're well suited for home defense. They are

11:20:09 1 incredibly dangerous.

11:20:10 2 It also goes to the risk they pose because it
11:20:12 3 goes to the risk, for example, that is present to police
11:20:15 4 when they're dealing with these. The fact that these
11:20:18 5 weapons with .223 --

11:20:21 6 THE COURT: Right. I saw that --

11:20:22 7 MR. ROSS: -- usually can fire through --

11:20:24 8 THE COURT: -- they penetrate 2X4 studs in a
11:20:27 9 house.

11:20:27 10 MR. ROSS: The three-eighths inch hardened
11:20:30 11 steel, Your Honor. Yes, Your Honor. So, I'm not going to
11:20:32 12 belabor that. If there's no dispute on that, that's great.
11:20:35 13 But we do think that's a critical factor on the issue.

11:20:40 14 THE COURT: And you were going to say -- let's
11:20:42 15 assume that's not disputed. You were also going to explain
11:20:45 16 the relevance.

11:20:45 17 MR. ROSS: Yes. I think part of the relevance
11:20:47 18 is because part of the relevant analysis when you have --
11:20:50 19 and Mr. Moritz will speak to this in greater detail,
11:20:53 20 right -- one of the things -- we think dangerousness
11:20:56 21 matters. We don't think you simply look at the numbers and
11:20:59 22 say, Well, they're not unusual, that's the end of the
11:20:59 23 analysis.

11:21:02 24 We think dangerousness matters. We speak
11:21:04 25 directly to dangerousness, not only generally, because

11:21:07 1 certainly it's true all weapons are dangerous. And it's
11:21:10 2 true that all guns when fired have the potential to kill.
11:21:13 3 That's not our argument, and we're not trying to ban all
11:21:16 4 guns.

11:21:16 5 But what is relevant for dangerousness is that
11:21:20 6 these weapons are uniquely dangerous even compared to other
11:21:25 7 guns. And it goes to that component of the Second Amendment
11:21:30 8 analysis.

11:21:30 9 THE COURT: And when you say "that component of
11:21:33 10 the Second Amendment analysis," you agree that all the guns
11:21:45 11 here that are in the bills, they are arms within the meaning
11:21:52 12 of the Second Amendment?

11:21:54 13 MR. ROSS: No, we do not. We do not believe
11:21:56 14 that -- because it goes to in common usage for self-defense,
11:21:59 15 and we don't believe that to be the case.

11:22:01 16 THE COURT: Right. And so the in common usage
11:22:03 17 or in common usage for self-defense, that is, in your
11:22:07 18 reading of the law, a question of whether or not something
11:22:10 19 is an arm or not?

11:22:12 20 MR. ROSS: That goes -- that's part of the
11:22:13 21 threshold analysis, yes, Your Honor.

11:22:15 22 THE COURT: So, hand grenades would not be an
11:22:18 23 arm?

11:22:18 24 MR. ROSS: Based on my understanding, it's not
11:22:22 25 a -- it's not within the scope of protection by the Second

11:22:25 1 Amendment, not in common use for self-defense. Yeah.

11:22:28 2 Correct.

11:22:28 3 THE COURT: Bazooka would not be an arm?

11:22:31 4 MR. ROSS: Correct.

11:22:31 5 THE COURT: But things like knives, tasers would
11:22:38 6 be arms?

11:22:38 7 MR. ROSS: Well, subject to the record, and I
11:22:41 8 will actually get to the tasers point in a minute, if I can
11:22:46 9 indulge, Your Honor?

11:22:46 10 THE COURT: Sure.

11:22:47 11 MR. ROSS: I do want to spend a couple minutes,
11:22:49 12 and I don't want to belabor it, but I do think given,
11:22:52 13 particularly what counsel said at the end about how we've
11:22:55 14 attempted to conflate semi-automatic and fully automatic, I
11:22:58 15 do want to talk about the firing nature of these weapons.
11:23:03 16 It's been suggested that to compare them to fully automatic
11:23:08 17 weapons is disingenuous. That's at Page 8. Six, excuse me,
11:23:12 18 of Gray's opening brief.

11:23:13 19 And what they say on Page 6 is that they
11:23:17 20 distinguish these from machine guns which they say can fire
11:23:20 21 between 750 and in the thousand rounds. And we have two
11:23:24 22 points we think are important on that, Your Honor.

11:23:27 23 First of all, the suggestion that the inability
11:23:30 24 to naturally fire or fully automatic makes them less lethal
11:23:36 25 is simply inaccurate. As the Fourth Circuit noted, the

11:23:40 1 difference between semi-automatic and fully automatic is, in
11:23:43 2 their words, slight and the uncontested record evidence --
11:23:46 3 Mr. Yurgealitis' Exhibit T is that from the military's
11:23:51 4 perspective, semi-automatic fire is often superior to
11:23:56 5 automatic fire in modern combat and has been described as
11:23:59 6 the most important firing technique. So, the idea that
11:24:03 7 while if it just doesn't fire fully automatic, it's not
11:24:05 8 nearly as lethal, that's not true.

11:24:08 9 The other important note is it is uncontested
11:24:11 10 that there are numerous inexpensive products available that
11:24:15 11 allow these guns to fire at rates comparable to the
11:24:21 12 750-to-1,000-round-per-minute figure that we saw in their
11:24:24 13 briefing. Here's --

11:24:26 14 THE COURT: And just to go back to your first
11:24:28 15 point there that it's preferable to have a semi-automatic,
11:24:35 16 not fully automatic, I take it that that at least partly
11:24:40 17 fits in with the Plaintiffs' theory that these are useful
11:24:43 18 for self-defense?

11:24:44 19 MR. ROSS: No, that's from the Army's
11:24:46 20 perspective in terms of armed combat.

11:24:48 21 THE COURT: Well, but, I mean, self-defense
11:24:50 22 potentially is armed combat; right?

11:24:53 23 MR. ROSS: Certainly one of the things that a
11:24:55 24 soldier in the theater of war is trying to do, one thing is
11:24:58 25 defend himself. Another can be offensive. What we don't

1 believe those features do is make them useful for
2 self-defense in the situations that civilians are regularly
3 involving themselves in. And I would note there is not a
4 single example that the Plaintiffs have cited ever of any
5 individual ever using either one of the banned weapons, or a
6 substantially similar weapon or a large-capacity magazine in
7 a self-defense situation. And for good reason.

8 You know, there are technical reasons that these
9 weapons are not well suited. And with respect to the use of
10 large-capacity magazines in self-defense, the Plaintiffs'
11 evidence indicates that in 82 percent of situations, no
12 shots are fired. And as Alice's statistical analysis of the
13 NRA's database indicates that the average number of shots
14 fired in a self-defense situation is 2.2. So, we're not
15 talking about anyone that needs anywhere near 17 rounds
16 handy to be able to defend themselves.

17 THE COURT: Well, so I looked at her
18 declaration, and I did see that her analysis was, I believe,
19 that no case that could be identified had ever involved more
20 than ten shots being fired.

21 MR. ROSS: It's consistent with my recollection.
22 That's right, Your Honor. Certainly well below the 17 that
23 we're talking about here.

24 And then beyond her analysis, no identification
25 of any incident ever where the Plaintiffs have said, This is

11:26:34 1 a situation where if a person didn't have access to anything
11:26:36 2 that's banned, their ability to defend themselves would be
11:26:40 3 compromised.

11:26:43 4 So, with respect to these modifications that
11:26:47 5 allow these to be shot at rates that are functionally
11:26:49 6 equivalent to fully automatic weapons, here's one example.
11:26:53 7 We discuss several of them in our brief. It's a \$49
11:26:57 8 adapter, the Hellfire Stealth. It is advertised as
11:27:01 9 installing invisibly in the grip and touted for the fact
11:27:04 10 that it allows you to shoot at 900 rounds per minute, which
11:27:07 11 is towards the higher end of the 750 to 1,000 figure that
11:27:11 12 the Plaintiffs said.

11:27:13 13 THE COURT: The legislation, either piece, do
11:27:22 14 either of them say one of the purposes was to, I don't know,
11:27:26 15 prevent the convention, the conversion, this kind of thing?

11:27:32 16 MR. ROSS: No, Your Honor, but what they do talk
11:27:35 17 about is the importance of enacting a legislation, among
11:27:39 18 other things, to prevent mass shootings. And the capacity
11:27:43 19 to take one of these and modify them where you can shoot at
11:27:46 20 the equivalent of 900 rounds per minute would be relevant to
11:27:51 21 that interest in protecting against those.

11:27:55 22 No need to go on -- to move the slides up, but
11:27:58 23 just to keep moving. On the right side of the slide, you
11:28:02 24 see the handgun, the AR-15 is turned sideways, and towards
11:28:07 25 the bottom there's the handle. Actually, let's just jump to

11:28:12 1 the next slide just to see.

11:28:14 2 So, where the finger is pointing, just to
11:28:16 3 contextualize this, we can call it out, that's an
11:28:19 4 enlargement of that bottom part of the handle, and that's
11:28:22 5 where it goes. It's a little round knob that fits in there.
11:28:26 6 And we're not going to play the video. We've cited to them
11:28:30 7 in our brief, but you know, features like this allow
11:28:33 8 somebody to take a hundred-round magazine and shoot it in
11:28:37 9 six seconds. Plaintiffs ignore the modification available
11:28:43 10 for these products in their entirety.

11:28:46 11 I also want to talk briefly about the origin of
11:28:48 12 the term assault weapon because it's been suggested that it
11:28:51 13 was somehow --

11:28:52 14 THE COURT: You know, I don't think it's
11:28:53 15 important --

11:28:54 16 MR. ROSS: Fine.

11:28:55 17 THE COURT: -- where the terms come from. I
11:28:56 18 mean, I gather there's a public relations aspect to both
11:29:04 19 sides of it. And I understand, you know, German, I can't
11:29:08 20 pronounce the word, but World War II, literally translates
11:29:12 21 more or less to assault weapon.

11:29:14 22 MR. ROSS: Yeah, and I'm not going to belabor --
11:29:16 23 if you could just put the slide up for one second. The Gun
11:29:22 24 Digest Book Assault Weapons from 1986, but let's take that
11:29:23 25 down. I've already touched on this, but there is a critical

11:29:26 1 dispute between the parties, notwithstanding very limited
11:29:30 2 evidence from the Plaintiffs on this, on the design
11:29:34 3 features, making them useful for home defense. They both
11:29:38 4 claim that at Page 7 of their opening briefs.

11:29:42 5 They don't have an expert declaration on it.
11:29:44 6 They actually cite a law review article by a Professor
11:29:47 7 Kopel, which I would invite the Court to read. It's the
11:29:52 8 rationale basis analysis for the assault weapon prohibition.
11:29:56 9 And I just want to spend a minute, because this is the
11:29:58 10 foundation of their claim about the importance of these
11:30:01 11 weapons for defense, just to talk about what that argument
11:30:04 12 rests upon.

11:30:05 13 The first thing in the excerpt that we see on
11:30:09 14 Slide 15 is a suggestion by Professor Kopel that there's no
11:30:13 15 real utility in requiring shooters to have to change their
11:30:19 16 magazines, that it does nothing to enhance safety. Both the
11:30:23 17 Third Circuit and Fourth Circuit and common sense, we would
11:30:28 18 suggest, make clear why that's not the case. Those are
11:30:31 19 actually some of the most important times in a mass
11:30:34 20 shooting.

11:30:34 21 He goes on to say in this middle callout that
11:30:37 22 it's elementary ballistics that these weapons are not
11:30:41 23 unusually destructive. And then they go on to say that
11:30:45 24 actually semi-automatic assault weapons are not designed to
11:30:49 25 kill. And this is, this article with these claims, is

11:30:54 1 basically the entirety of the foundation for their argument
11:30:57 2 that these are useful for self-defense.

11:30:59 3 THE COURT: Well, does it matter whether they're
11:31:04 4 useful or not because -- and it's been mentioned this
11:31:08 5 morning, but I do remember, you know, vaguely seeing this in
11:31:12 6 the briefing, that if people purchase it or possess it for
11:31:21 7 self-defense, does it matter whether it's the best -- and
11:31:31 8 Yurgealitis spent a lot of time on this, too. Does it
11:31:33 9 matter that it's not, perhaps in most people's judgment, the
11:31:38 10 best self-defense weapon or maybe even not really a very
11:31:42 11 sensible self-defense weapon generally?

11:31:47 12 MR. ROSS: We do think the evidence matters for
11:31:48 13 a few reasons, Your Honor. First of all, we think that the
11:31:52 14 evidence that the Plaintiffs have is a retailer survey,
11:31:56 15 which if you actually read the survey itself, cautions
11:32:00 16 against actually relying upon it. But put that to the side.

11:32:05 17 It goes to the weight to be given to that where
11:32:09 18 someone's claiming they're buying it for that reason. It
11:32:11 19 also is relevant, Your Honor, because we acknowledge that
11:32:16 20 Supreme Courts held that a core -- the core of the Second
11:32:20 21 Amendment is self-defense. And the utility of whether it is
11:32:24 22 actually useful for that purpose we believe is important to
11:32:28 23 considering whether you have infringed on a right that is
11:32:32 24 protected by the Second Amendment, if you get through all
11:32:34 25 the other aspects of the test. But I think if you have

11:32:37 1 something clearly that's not useful in self-defense that is
11:32:40 2 relevant where the purpose of the Second Amendment is to
11:32:43 3 protect self-defense, to protect one's ability, excuse me,
11:32:47 4 to defense themselves.

11:32:48 5 THE COURT: So, does this go into the question
11:32:50 6 of regulation, or is this a question of whether the things
11:32:53 7 are arms in the first place?

11:32:55 8 MR. ROSS: So, I think it bears on the first
11:32:59 9 question, which is whether or not they're in common use for
11:33:02 10 self-defense. So, it does bear on that threshold question.

11:33:07 11 And then it also bears upon, even if you were
11:33:09 12 within it, as you think about the scope of regulation and
11:33:14 13 the nature of the fact that it is relevant there, but it is
11:33:17 14 directly relevant to the question of whether or not these
11:33:19 15 products are in common use for these purposes.

11:33:23 16 And in multiple courts, including the First
11:33:26 17 Circuit in *Morman* and the D.C. circuit in *Heller II* have
11:33:29 18 found that they're not well suited for self-defense. I have
11:33:34 19 slides. You're going to see slides, but you don't have to
11:33:36 20 go through them, given what we discussed before on the
11:33:40 21 destructive power of these weapons.

11:33:41 22 I would note that the news reports of people who
11:33:46 23 have been -- from doctors who have been shot with these
11:33:48 24 weapons really mirrors what you see in the Vietnam field
11:33:51 25 test report because they shared the same destructive power.

11:33:55 1 If it would be useful, I'll just spend a minute very briefly
11:33:59 2 talking about why it is that there is such a fundamental
11:34:02 3 difference. And it's due to something called cavitation,
11:34:05 4 which is that when the bullets that are shot by these
11:34:08 5 weapons traveling at, you know, 3,000 feet per second or
11:34:11 6 more compared to, say, one thousand --

11:34:13 7 THE COURT: I don't think I really need to
11:34:15 8 understand the science of this --

11:34:16 9 MR. ROSS: Okay.

11:34:17 10 THE COURT: -- as my day job.

11:34:20 11 MR. ROSS: Well, we'll move on. We have a
11:34:22 12 video. It's in the slides, if Your Honor cares to see it,
11:34:24 13 but we don't need to burden the Court with watching it here.

11:34:29 14 It is uncontested in this factual record that
11:34:33 15 these weapons are not well suited for hunting, not for
11:34:38 16 recreational. That, in fact, their ability to use these in
11:34:42 17 shooting competitions is often regulated, that they are, in
11:34:45 18 fact, well suited --

11:34:48 19 THE COURT: Well, so, Mr. Ross, the number that
11:34:53 20 I was using with the Plaintiffs that there's 10 million of
11:34:56 21 these out there already, you know, give or take a million or
11:35:00 22 two, do you disagree with that?

11:35:03 23 MR. ROSS: No, we don't. We're not --

11:35:05 24 THE COURT: So, they're not suitable for
11:35:07 25 hunting. They're not suitable for target shooting. They're

11:35:10 1 not suitable for self-defense. Why do 10 million people
11:35:13 2 have these?

11:35:15 3 MR. ROSS: Well, people's perceptions as to what
11:35:18 4 they may want to do with them certainly is one thing. And
11:35:21 5 it's not to suggest that someone might not buy it thinking
11:35:25 6 they want to use it for that purpose. But the question
11:35:27 7 here, we believe, is suitability, not someone's subjective
11:35:32 8 belief as to I'd like to have it for this reason, but an
11:35:35 9 actual evidentiary question of their utility.

11:35:38 10 THE COURT: Let me just think about that for a
11:35:42 11 minute.

11:35:50 12 MR. ROSS: So --

11:35:51 13 THE COURT: Hold on just a second. So,
11:36:04 14 basically your position would be if lots of people purchased
11:36:07 15 firearms of one kind or another thinking they can use them
11:36:13 16 in self-defense, but essentially experts say they're not
11:36:18 17 good self-defense weapons, then they're not in common use
11:36:25 18 for self-defense?

11:36:26 19 MR. ROSS: Well, I think that's -- so, I think
11:36:29 20 there's -- the question whether or not common use for self
11:36:32 21 defense has a number of factors. One of which is: Is there
11:36:34 22 evidence that they're actually being used for this? And on
11:36:36 23 this record, there is none.

11:36:38 24 As to thinking about, you know, the effect of
11:36:42 25 regulation on one's ability to defend, we do think the

11:36:46 1 utility point here, which is from the evidentiary
11:36:49 2 perspective basically undisputed, is relevant. And I would
11:36:52 3 also note, just thinking further about Your Honor's question
11:36:55 4 of, you know, well, why are people buying them, well, one
11:36:57 5 reason I think people are buying them, as we saw earlier,
11:37:00 6 they're being marketed as, You can own what soldiers own.

11:37:04 7 THE COURT: So, that would be more like a
11:37:06 8 collection sort of purpose?

11:37:08 9 MR. ROSS: It is like a collection or a desire
11:37:11 10 to own something similar to what soldiers own, either to
11:37:15 11 collect them or simply to feel like, you know, I want to be
11:37:19 12 like a soldier. But that doesn't put it into one of the
11:37:24 13 enumerated categories.

11:37:26 14 With respect to the numbers that Your Honor's
11:37:29 15 asked about and that counsel talked about, what is
11:37:32 16 uncontested is that the number of assault weapons is a very
11:37:37 17 small fraction of all guns in circulation, that they're
11:37:41 18 owned by a very small percentage of people.

11:37:44 19 THE COURT: So, roughly 2.5 percent?

11:37:46 20 MR. ROSS: Roughly, give or take, something in
11:37:48 21 that low single digit, yes, Your Honor.

11:37:50 22 In terms of the -- that's in terms of the
11:37:55 23 fractions of guns that are represented by these. It's, I
11:38:00 24 believe, an even smaller percentage, I believe it's in the
11:38:03 25 one-and-a-half percent on terms of the percentage of people

11:38:05 1 that own them, because many people own multiple weapons.

11:38:09 2 Also, undisputed that the growth in these
11:38:11 3 figures, much of it has occurred within the last decade or
11:38:16 4 so since the repeal of the assault weapons ban. And
11:38:19 5 Mr. Moritz will talk about this, but the idea that there's
11:38:21 6 never been a regulation of these weapons, there was, in
11:38:24 7 fact, the assault weapons ban.

11:38:26 8 THE COURT: Right. But the fact that there was
11:38:32 9 an assault ban -- well, you said Mr. Moritz will talk about
11:38:36 10 it. I'll let him talk about it.

11:38:38 11 MR. ROSS: Okay. I do want to talk about
11:38:40 12 another number that the Plaintiffs make much of in their
11:38:43 13 reply brief, and it's the 200,000. And I just told Your
11:38:45 14 Honor I was going to get here, which Justice Alito talked
11:38:49 15 about it in his concurrence in *Caetano*. And per the
11:38:53 16 Plaintiffs, that 200,000 is basically enough to say, You've
11:38:57 17 got a protected Second Amendment right.

11:38:59 18 Of course, the Supreme Court recognizes that you
11:39:01 19 can regulate machine guns. And even today, the Plaintiffs
11:39:06 20 said they're not suggesting you can't regulate machine guns.
11:39:09 21 But if we look at what's on the right, this is a letter from
11:39:13 22 the Bureau of Alcohol, Tobacco and Firearms showing there
11:39:17 23 are literally hundreds of thousands of machine guns that are
11:39:21 24 out there.

11:39:21 25 And, therefore, if this basic numerical analysis

11:39:25 1 was enough, 200,000 is enough, the Plaintiffs can't
11:39:32 2 reconcile that with the idea that you can actually regulate
11:39:35 3 machine guns.

11:39:36 4 THE COURT: I thought I saw in the briefing
11:39:40 5 somewhere that there were 800,000 machine guns.

11:39:43 6 MR. ROSS: Well, so that is an overall figure.
11:39:47 7 The figure we see here, the 175 is -- and that larger figure
11:39:53 8 would include, for example, guns in law enforcement in the
11:39:56 9 United States. The pre-1986 176,000 figure, until 1986 they
11:40:02 10 were not illegal to manufacture. And so, this is a number
11:40:06 11 of legal civilian-owned machine guns in the United States.

11:40:12 12 And so, which, by the way, goes to another
11:40:15 13 important point, Your Honor, in terms of the figures and the
11:40:18 14 10 million. That is a very general number, which we'll
11:40:21 15 assume for Plaintiffs' purposes. It does not attempt to
11:40:24 16 differentiate those that are used by law enforcement. It
11:40:27 17 doesn't attempt to differentiate those that are used by
11:40:29 18 criminals. So, the number of those weapons that are
11:40:32 19 actually even owned and used by private civilians is
11:40:35 20 smaller.

11:40:36 21 THE COURT: So, in a case of -- you know, you're
11:40:41 22 saying in common use for the lawful purposes. Whose burden
11:40:54 23 is it to address that point?

11:40:56 24 MR. ROSS: We believe it is the Plaintiffs'
11:40:57 25 burden, Your Honor, to establish that what we're talking

11:41:00 1 about is something that would fall within the protection of
11:41:02 2 the Second Amendment. Once you're within that, then the
11:41:07 3 State has an obligation to find historically --

11:41:12 4 THE COURT: All right. *Bruen* makes that pretty
11:41:13 5 clear.

11:41:14 6 MR. ROSS: Right, but I think to trip that wire,
11:41:16 7 the Plaintiffs have to get into the Second Amendment rights.
11:41:19 8 And so, it's their burden to establish they're talking about
11:41:22 9 a protected right.

11:41:25 10 Very briefly on large-capacity magazines, just
11:41:28 11 some context. Uncontested that, like assault weapons, they
11:41:32 12 were developed for the military. We're talking about things
11:41:34 13 like we see on the right here, magazines that hold a hundred
11:41:38 14 rounds. They are marketed for their killing power.

11:41:43 15 Here's an example of advertising which offers a
11:41:46 16 60-round magazine, talks about their advantages in a fire
11:41:50 17 fight, twice the violence. Critically, critically
11:41:54 18 uncontested that there are many legally compliant magazines
11:41:58 19 available.

11:41:59 20 Here's just one website. And what I've done
11:42:02 21 here, you can see the red box about halfway down. These are
11:42:04 22 just magazines available for the AR-15. And they're
11:42:08 23 separated at the bottom by their capacity. And what you see
11:42:11 24 is that this website alone has 105 different magazines
11:42:15 25 available for purchase for the AR-15, all of which would be

11:42:19 1 legally compliant.

11:42:21 2 So, whether a weapon was shipped originally with
11:42:24 3 a larger magazine, this goes back to Your Honor's question:
11:42:27 4 Does any weapon need any of these to function? They do not.

11:42:30 5 Mr. Moritz -- the regulatory history is also
11:42:36 6 largely uncontested, and Mr. Moritz is going to deal with
11:42:39 7 that in the context of the Second Amendment. I want to take
11:42:42 8 just a few minutes before handing it off to him to talk
11:42:45 9 about why large-capacity magazines are not arms.

11:42:48 10 It is, as we talked about, the Plaintiffs'
11:42:49 11 burden, we believe, to establish they are protected. We
11:42:52 12 have submitted a declaration from Professor Dennis Baron,
11:42:56 13 who talks about how, from the founding through ratification,
11:43:00 14 arms were different from controls. Accoutrements were
11:43:04 15 accessories like ammunition holders.

11:43:06 16 THE COURT: Well, so I did look at that
11:43:09 17 declaration, too. My impression was that, you know, in 1790
11:43:21 18 people carried their bullets in a pouch that they wore on a
11:43:25 19 belt.

11:43:26 20 MR. ROSS: Yeah.

11:43:26 21 THE COURT: This is the cartouche pouch, and I
11:43:29 22 forget what, cartridge, belt, pallet, whatever, is even like
11:43:34 23 all the westerns on TV where they all have the bullets. I
11:43:38 24 mean, different kind of thing.

11:43:39 25 So, I was wondering, because now the pouch

11:43:51 1 attaches to the gun, which is not something that happened in
11:43:54 2 1790. I'm kind of wondering: So, how does that play out?

11:43:59 3 MR. ROSS: Sure. Certainly. I think Professor
11:44:02 4 Baron's point is that in languages used at the time, the
11:44:06 5 reference to arms was something that was different, not only
11:44:11 6 from where you carried it, but a number of other accessories
11:44:14 7 that were used in connection with the gun. And that the
11:44:17 8 term arm is focused on the weapon itself and not
11:44:22 9 accessories.

11:44:23 10 And it's not just in the 1790s that magazines
11:44:27 11 were thought of as accessories. If we can go to Slide 30.
11:44:31 12 Here's the Heckler & Koch catalog. We've blown up, because
11:44:36 13 I was having a hard time reading the heading on the right
11:44:39 14 "Accessories." And what we see in this, and this is
11:44:43 15 Exhibit 7 to our brief, that the magazines are listed as
11:44:47 16 accessories, along with things like cases and weapons used
11:44:52 17 to maintain them.

11:44:53 18 And it was the *Ocean State Tactical* Court, also
11:44:57 19 relying on Professor Baron's expert declaration, which found
11:45:02 20 that these weapons -- that these magazines, excuse me, were
11:45:06 21 not arms protected by the Second Amendment. It went through
11:45:10 22 the textual analysis.

11:45:11 23 THE COURT: Would I be correct in thinking that
11:45:12 24 the *Ocean State* is on appeal to the First Circuit right now?

11:45:16 25 MR. ROSS: That's my understanding. Plaintiffs

1 call it an outlier. It is, to our knowledge, the only case
2 that's considered this issue. It is not, however, the only
3 case to have found that magazines are not protected by the
4 Second Amendment. The *Oregon Firearms Foundation* case from
5 the District of Oregon in 2022, which is cited in our
6 briefing, found that in *Duncan v. Bonta* the Ninth Circuit's
7 2020 en banc opinion.

8 Now, the Plaintiffs say we ignore the contrary
9 precedent at Page 13 of the reply, but they haven't cited
10 any. They haven't cited any cases saying that they fall
11 within the Second Amendment.

12 And I want to be clear about what the State's
13 position here is and is not. The Plaintiffs say they're
14 implicitly protected because they're necessary to exercise
15 the Second Amendment right. That's at Page 13 of the reply.
16 There's no evidence of that here, Your Honor. There's no
17 evidence that these specific banned magazines are necessary.

18 THE COURT: And that kind of comes from your
19 point that any firearm in existence can work with a
20 non-banned magazine?

21 MR. ROSS: Yes, and it's critical -- that's
22 exactly right and critical. In the reply brief, the
23 Plaintiffs suggest that the State's position is that the
24 Second Amendment only protects the right to bear an
25 inoperable arm, and that's not the case here. There's no

11:46:36 1 evidence that any arm is rendered inoperable.

11:46:41 2 It also disposes of the argument at Page 15 of
11:46:44 3 the reply that the State can't ban magazines or other
11:46:46 4 components integral in an operating firearm. There's no
11:46:50 5 evidence that any of these are.

11:46:52 6 And before I sit down, the last thing I wanted
11:46:54 7 to --

11:46:55 8 THE COURT: And in that regard, silencers are
11:47:01 9 banned; right?

11:47:02 10 MR. ROSS: They were banned. And we believe --
11:47:05 11 thank you for returning me there, Your Honor, that the
11:47:08 12 silencer -- counsel, to anyone who's asked about it, said
11:47:14 13 we're not saying that's an arm. And we think the analysis
11:47:17 14 is the same and, in fact, the *Ocean State Tactical* Court
11:47:20 15 made that very point.

11:47:21 16 THE COURT: Okay.

11:47:22 17 MR. ROSS: Lastly, I want to take a minute to
11:47:24 18 talk about the *Association of New Jersey*, the Third Circuit
11:47:28 19 case in 2018 where we acknowledge did find in that case that
11:47:33 20 magazines were protected by the Second Amendment. Of
11:47:35 21 course, it predates by four years *Bruen*. It didn't consider
11:47:41 22 the textual analysis.

11:47:43 23 THE COURT: So, you know, one of the questions
11:47:46 24 that comes up sometimes when you're in my situation is when
11:47:51 25 the Court of Appeals says something, are they saying it in a

11:47:57 1 way that's binding, or are they saying it because, you know,
11:48:04 2 if something is an appeal from a preliminary injunction,
11:48:07 3 you're generally not having actual facts found. You're
11:48:14 4 talking about probabilities.

11:48:20 5 Was what they said something that would be
11:48:23 6 binding unless *Bruen* has changed it?

11:48:26 7 MR. ROSS: So, on the issue and the fact
11:48:29 8 presented, we think, yes, but we think as the U.S. Supreme
11:48:33 9 Court noted in *Cooper Industries* cited by the Middle
11:48:38 10 District of Pennsylvania in *Misja vs. Pennsylvania State*
11:48:43 11 *Educational Association* 2016 Westlaw 1165 1732 at 5, that
11:48:50 12 questions which merely lurk in the record, either brought to
11:48:53 13 the attention of the Court nor ruled upon are not to be
11:48:56 14 considered as having been so decided so as to constitute
11:48:59 15 precedence. So, if we were simply getting up and saying,
11:49:02 16 Your Honor, we just don't think that the Second Amendment
11:49:04 17 should apply to magazines, that argument, we believe, is
11:49:08 18 foreclosed.

11:49:09 19 The question of whether or not, given the
11:49:12 20 textual analysis that was required four years after the
11:49:15 21 fact, how that is applied to those is a question that the
11:49:18 22 Third Circuit has not touched.

11:49:21 23 THE COURT: But as I was earlier telling
11:49:27 24 Mr. Pileggi, you would have me say that I'm not bound by
11:49:38 25 what the Third Circuit said because the Supreme Court has

11:49:42 1 used a different mode of analysis subsequently, and that I
11:49:52 2 predict the Third Circuit would change its -- either not
11:49:59 3 regard itself -- well, probably not regard itself as bound
11:50:02 4 by it, something along those lines?

11:50:05 5 MR. ROSS: Well, look, I think the outcome is
11:50:07 6 the same. I think the way we would think about it is the
11:50:09 7 following, Your Honor, which is the Supreme Court has made
11:50:12 8 clear what needs to be considered. It's just simply not
11:50:16 9 something that was ever presented to the Third Circuit.

11:50:18 10 So, the Third Circuit hasn't spoken on the
11:50:22 11 inquiry that is now mandated by the Supreme Court.

11:50:25 12 THE COURT: Well, that sort of gets to a
11:50:27 13 different thing, which is in *Bruen*, I think maybe in *Heller*
11:50:35 14 II, but somewhere, the Supreme Court seemed to suggest that
11:50:44 15 things could be decided based on the record that the parties
11:50:47 16 presented; right?

11:50:49 17 MR. ROSS: There is language to that effect.
11:50:51 18 Yes, Your Honor.

11:50:52 19 THE COURT: And so, does that mean that the
11:50:57 20 parties, you-all, could present whatever it is you're
11:51:03 21 presenting. A judge could make a ruling on that. Then some
11:51:08 22 other Plaintiff comes along and says, you know what, I have
11:51:12 23 some different stuff I'd like to cite to you. So, we can do
11:51:16 24 it again, and maybe the outcome will be different because
11:51:19 25 the record is different?

11:51:21 1 MR. ROSS: So, I suspect neither the Supreme
11:51:23 2 Court nor any other Court would like a rule that says you
11:51:26 3 can say, well, I have one more fact; and therefore, you have
11:51:30 4 to --

11:51:30 5 THE COURT: Not the same Plaintiff. A different
11:51:32 6 Plaintiff.

11:51:33 7 MR. ROSS: No, no. I didn't mean that.
11:51:34 8 Plaintiff 2, I have one more fact. You've done the type of
11:51:38 9 analysis. I have one more fact, and I think it changes it.

11:51:42 10 And I think there's an interesting question as
11:51:44 11 to how it's going to play out, given some of that language.
11:51:47 12 But I think we're not anywhere near that scenario. We're
11:51:49 13 dealing with an issue that simply wasn't on the table in
11:51:52 14 2018 in terms of the textual analysis.

11:51:54 15 And so, we're not in a World War coming in and
11:51:58 16 saying, Well, they gathered a bunch -- they had, you know
11:52:01 17 version one of Professor Baron's declaration, and we have
11:52:04 18 version two, and he's got way more stuff. We have evidence
11:52:06 19 on points that simply were not considered and are now
11:52:10 20 directly relevant.

11:52:11 21 THE COURT: Well, on that regard, maybe this is
11:52:14 22 Mr. Moritz's burden, but I do actually recall seeing in
11:52:22 23 *Bruen* lots of discussion about why Bowie knives and
11:52:27 24 slungshots, I think, were not carrying the day in that case.
11:52:37 25 And am I allowed to rehash that material?

11:52:41 1 MR. ROSS: So, you are treading into
11:52:43 2 Mr. Moritz's, and so this is probably a nice point for me to
11:52:46 3 segue way to him, unless Your Honor has anything on what
11:52:49 4 I've covered.

11:52:50 5 THE COURT: I would like to hear from him.

11:52:52 6 MR. ROSS: Sure.

11:52:52 7 THE COURT: Thank you, Mr. Ross.

11:52:54 8 MR. ROSS: And then, I have, just at the end, a
11:52:56 9 minute or two on the Delaware Constitution, but we can save
11:53:00 10 that until the end.

11:53:03 11 MR. MORITZ: Good morning, Your Honor. Garrett
11:53:06 12 Moritz from Ross Aronstam on behalf of the Defendants.

11:53:09 13 THE COURT: Good morning.

11:53:09 14 MR. MORITZ: So, I'll try to start by going
11:53:15 15 right to your question, but what I'm going to spend the
11:53:17 16 first part of my presentation on is going through the legal
11:53:20 17 standard for Second Amendment challenges, where we are after
11:53:24 18 *Bruen* and what the State makes of it.

11:53:29 19 But to answer your question about Bowie knives
11:53:32 20 and slungshots, and it is, indeed, slungshots, not
11:53:35 21 slingshots. They're different things. The question, the
11:53:40 22 framework in *Bruen*, I'm going to go through this, is whether
11:53:43 23 historical regulations are relevantly similar. For the
11:53:47 24 handgun restriction, the very broad handgun regulation that
11:53:51 25 was at issue in *Bruen*, the permitting, the may issue, it was

11:53:57 1 not relevantly similar, but it doesn't say that all of the
11:54:01 2 history and historical tradition of the United States is out
11:54:05 3 the window. It says, That's the thing you have to look to,
11:54:09 4 and that's what we're going to try to do.

11:54:10 5 So, to walk through this, let's start on the
11:54:13 6 legal standard. We'll start with Slide 32. I'm not going
11:54:17 7 to read it to you, but we'll start with the text of the
11:54:20 8 Second Amendment. And it provides that there's a right of
11:54:22 9 the people to keep and bear arms that shall not be
11:54:25 10 infringed. And what *Bruen* says is that the Second Amendment
11:54:30 11 in that language codified a preexisting right, and that the
11:54:35 12 right is not unlimited, and it's not a right to keep and
11:54:38 13 carry any weapon whatsoever in any manner whatsoever and for
11:54:42 14 whatever purpose.

11:54:44 15 What was that preexisting right? If you look at
11:54:48 16 *Heller*, *Heller* goes on for about ten pages, Pages 593 to 603
11:54:56 17 of the U.S. Reporter version, talking about that the
11:54:59 18 preexisting right, as of the time of the American Bill of
11:55:02 19 Rights, was a right of self-defense. It talks about the
11:55:05 20 English Bill of Rights. It was a right of self-defense, a
11:55:08 21 right of self preservation. The State Constitutional
11:55:12 22 provisions put in place on the right to bear arms around the
11:55:15 23 time of the U.S. Bill of Rights, self-defense.

11:55:19 24 The ones immediately after, self-defense. If
11:55:23 25 you read those ten pages of *Heller*, it's all about that

11:55:26 1 preexisting right being a fundamental basic right to defend
11:55:29 2 yourself before the authorities can arrive.

11:55:32 3 Let's go to Slide 3. So, *Bruen* says the Second
11:55:37 4 Amendment presumptively protects conduct if it is within the
11:55:41 5 Second Amendment's plain text. So, it creates this
11:55:44 6 presumption. And that analysis, as *Bruen* does it, is to say
11:55:49 7 whether the regulated item fits within the category of
11:55:52 8 bearable arms, and whether the regulated item is in common
11:55:56 9 use today for self-defense. That's *Bruen* at 2134.

11:56:02 10 And so, that analysis, whether something is
11:56:05 11 within the preexisting right, I want to be very clear here.
11:56:08 12 It's more than just is something an arm. There was some
11:56:12 13 dialogue going back and forth. Is a bazooka an arm? Of
11:56:16 14 course a bazooka is an arm, but it's not an arm that's
11:56:19 15 within the preexisting right, as *Bruen* lays it out.

11:56:24 16 Now, there's some debate we've joined about this
11:56:26 17 step.

11:56:27 18 THE COURT: And the reason why it's not a
11:56:29 19 preexisting right is what?

11:56:30 20 MR. MORITZ: Because it's not something that is
11:56:32 21 in common use for self-defense.

11:56:35 22 THE COURT: But the only reason it's not in
11:56:37 23 common use for or maybe not the only reason, but a reason
11:56:40 24 why it's not in common use for self-defense is because it's
11:56:43 25 already -- you know, you'd be arrested if you walked around

11:56:47 1 with a bazooka.

11:56:49 2 MR. MORITZ: Look, the Supreme Court says, Is it
11:56:51 3 in common use for self-defense? Is it in common use today
11:56:53 4 for self-defense, those sorts of formulations? And it's
11:56:56 5 just not. And so, it's an extreme -- there's a reason, I
11:57:01 6 think, that that's where our society is is that it's an
11:57:05 7 extremely destructive, offensive military weapon. And
11:57:09 8 military weapons, the Supreme Court has talked about that.

11:57:12 9 THE COURT: Yeah, in any event, I think it's
11:57:15 10 pretty crystal clear.

11:57:17 11 MR. MORITZ: Right.

11:57:17 12 THE COURT: The way you have this up here, two
11:57:23 13 questions from *Bruen*.

11:57:25 14 MR. MORITZ: Mm-hmm.

11:57:25 15 THE COURT: One is: Does it fit within the
11:57:27 16 category of bearable arms? And so, there is a wide range of
11:57:31 17 weapons that fit within the category of bearable arms --

11:57:35 18 MR. MORITZ: Right.

11:57:35 19 THE COURT: -- which would include a bazooka.

11:57:39 20 MR. MORITZ: Right.

11:57:39 21 THE COURT: But then the second question is
11:57:42 22 whether the item is in common use today for self-defense,
11:57:47 23 and you have to answer that question yes before you then
11:57:52 24 say, okay, it's an arm within the meaning of the Second
11:57:55 25 Amendment.

11:57:55 1 MR. MORITZ: Yeah. Well, the way I would put it
11:57:58 2 is: Is it within the preexisting right of the Second
11:58:02 3 Amendment? Yes. Is it an arm within what's protected by
11:58:04 4 the Second Amendment?

11:58:06 5 THE COURT: Well, so the majority opinions in
11:58:09 6 *Bruen* and maybe in *Heller II*, but I think in *Bruen*,
11:58:13 7 particularly say: Is it within the plain text? You've got
11:58:17 8 it up there. Plain text. How does common use today for
11:58:22 9 self-defense meet the plain text requirement?

11:58:26 10 MR. MORITZ: You're absolutely right that it's a
11:58:29 11 really interesting question, and I've spent some time
11:58:31 12 reading it. And I think this is exactly what *Bruen* and
11:58:35 13 *Heller* do.

11:58:35 14 And here's how they get there. What does the
11:58:38 15 plain text say? It says the right of the people to bear --
11:58:42 16 keep and bear arms shall not be infringed. And then it
11:58:44 17 asks: What is that right? And it says that right is this
11:58:48 18 right to self-defense, to use weapons in common use for
11:58:53 19 self-defense. And it's not -- I'm not making this up.

11:58:55 20 In part 3A of the *Bruen* decision, the plain text
11:58:59 21 analysis, that's at 2134, the Supreme Court analyzed this.
11:59:04 22 Are handguns in common use today for self-defense within the
11:59:07 23 plain text component? There's a whole heading on that.
11:59:09 24 That's where *Bruen* does that part of the analysis.

11:59:11 25 Then it flips to the historical tradition of

11:59:15 1 weapons regulation, a separate heading.

11:59:17 2 THE COURT: Can you just hold on one second?

11:59:19 3 MR. MORITZ: Sure.

11:59:43 4 THE COURT: So, I'm looking at the opinion and
11:59:47 5 I've got 3A, which is about six or seven paragraphs.

11:59:51 6 MR. MORITZ: Mm-hmm.

11:59:51 7 THE COURT: And by the end of that, it says, and
12:00:05 8 I'm quoting, "The Second Amendment's plain text, thus,
12:00:09 9 presumptively guarantees Petitioners Koch and Nash a right
12:00:12 10 to bear arms in public for self-defense."

12:00:16 11 MR. MORITZ: Mm-hmm.

12:00:16 12 THE COURT: What you're saying here is the
12:00:21 13 common use business is dealt with right at the beginning of
12:00:25 14 that section?

12:00:27 15 MR. MORITZ: Right, the very first paragraph,
12:00:28 16 Your Honor.

12:00:29 17 THE COURT: Is there more discussion about
12:01:03 18 common use for self-defense? Because most of the references
12:01:07 19 to it that I marked in my copy of the opinion occur later.
12:01:12 20 Does that also impact any of the subsequent analysis or is
12:01:17 21 it once you've got to the end of 3A is that no longer --

12:01:22 22 MR. MORITZ: Yeah.

12:01:22 23 THE COURT: -- relevant?

12:01:23 24 MR. MORITZ: Right. So, when you do the
12:01:24 25 historical analysis, the next part of the historical

12:01:28 1 analysis looks heavily on to what is the impact on the
12:01:32 2 ability to self defend. That's how the Court explained, or
12:01:36 3 it didn't say it was exhaustive, but it says two of the
12:01:38 4 considerations are to look at whether -- how the regulation
12:01:42 5 impacts self-defense. And we'll get to that shortly as I
12:01:49 6 march through this.

12:01:50 7 If the Plaintiff succeeds in establishing that
12:01:53 8 the Second Amendment presumptively applies, then the *Bruen*
12:01:56 9 analysis requires the Government to prove that its firearms
12:01:59 10 regulation is consistent with the nation's historical
12:02:03 11 tradition. If we go to Slide 34, we have some callouts of
12:02:06 12 that. That's the Government's burden to prove that the
12:02:10 13 regulation is part of the historical tradition. And I would
12:02:15 14 point out in Footnote 1 of the joint reply brief that the
12:02:20 15 Plaintiffs submitted -- we'll put that up on the screen. If
12:02:22 16 you look at what the Plaintiffs say, this is Footnote 1 of
12:02:26 17 the joint brief, the complete standard mandated by the
12:02:29 18 Supreme Court requires, one, determining through textual
12:02:34 19 analysis that the Second Amendment protected an individual
12:02:37 20 right to armed self-defense; and two, relying on the
12:02:41 21 historical understanding of the amendment to demark the
12:02:45 22 limits of the exercise of that right.

12:02:47 23 And then it says, once that first test is met,
12:02:50 24 it becomes the burden of the State to demonstrate that the
12:02:53 25 burdensome restrictions upon the right to own common arms

12:02:56 1 are consistent with this nation's historical tradition so as
12:03:00 2 to fall outside of the Second Amendment's unqualified
12:03:03 3 command.

12:03:03 4 That's not our brief. That's the Plaintiffs'
12:03:06 5 brief.

12:03:06 6 And so, how is a Trial Court judge to determine
12:03:10 7 what the historical tradition is? *Bruen* speaks to this at
12:03:14 8 Footnote 6. Your Honor alluded to this.

12:03:16 9 THE COURT: Mr. Moritz, before you get there,
12:03:18 10 maybe this is what Mr. Ross said, but the State's position
12:03:26 11 is these are not arms protected by the Second Amendment.
12:03:32 12 End of story. We go home.

12:03:34 13 MR. MORITZ: I would say it this way: These are
12:03:35 14 not arms that are presumptively within the scope of the
12:03:38 15 Second Amendment. But then the second part is even if they
12:03:41 16 are presumably --

12:03:42 17 THE COURT: But if they're not presumptively
12:03:44 18 within, that's the same thing as saying they're not within.

12:03:47 19 MR. MORITZ: Correct.

12:03:47 20 THE COURT: Presumably, you can't do something
12:03:49 21 later to overcome the presumption that they're not in.

12:03:53 22 MR. MORITZ: Thank you, Your Honor. Absolutely,
12:03:55 23 yes. That's only part one of our argument, though. We have
12:03:57 24 a historical piece, too.

12:03:59 25 THE COURT: So, on part one, you're actually in

12:04:03 1 agreement with the Plaintiffs that that's essentially just a
12:04:12 2 legal question, or are you in agreement that, in fact,
12:04:15 3 that's a question you don't need any record for?

12:04:17 4 MR. MORITZ: You do need a record for that. You
12:04:19 5 do need a record for that because the question of common use
12:04:23 6 for self-defense is something that you can't find by looking
12:04:27 7 at a piece of paper in the Constitution. You do need to
12:04:31 8 know something about what the reality is in the world. And
12:04:34 9 so, that does require an evidentiary record of some kind.

12:04:38 10 So, but let's get to the historical tradition.
12:04:43 11 If something is within the scope of the preexisting right
12:04:50 12 presumptively protected by the Second Amendment, the
12:04:52 13 regulation could still be upheld if the Government meets its
12:04:56 14 burden to prove that it's consistent with historical
12:04:59 15 tradition. Courts are permitted -- this is Footnote 6 of
12:05:02 16 *Bruen* -- or entitled to decide a case based on historical
12:05:05 17 record compiled by the parties. There is a historical
12:05:09 18 record compiled here by the Defendants.

12:05:11 19 THE COURT: Right. This is the footnote I was
12:05:13 20 thinking about.

12:05:14 21 MR. MORITZ: Exactly.

12:05:14 22 THE COURT: I don't know why I couldn't remember
12:05:16 23 where I had seen it.

12:05:17 24 MR. MORITZ: Yeah. Straight from *Bruen*. And
12:05:18 25 *Bruen* and *Heller* are clear that they do not -- oh, and by

12:05:21 1 the way, Mr. Lehman, I think he said that something along
12:05:24 2 the lines of *Bruen* already did all the historical analysis
12:05:28 3 that's needed.

12:05:28 4 That's not what *Bruen* said. It said, Courts are
12:05:32 5 entitled to rely on the parties. It said, We're not
12:05:35 6 deciding, you know, every issue of history. In fact, *Bruen*
12:05:39 7 and *Heller* are clear that they do not exhaustively answer
12:05:43 8 all the questions about the historical tradition or how it
12:05:46 9 applies. But *Bruen* does provide guidance, if we go to Slide
12:05:50 10 37.

12:05:51 11 *Bruen* talks about what you do when you're
12:05:54 12 dealing with modern arms regulations that couldn't really
12:05:58 13 have been -- anticipated the founding unprecedented societal
12:06:02 14 concerns or dramatic technological changes requiring a more
12:06:06 15 nuanced approach. You do reasoning by analogy with more
12:06:11 16 modern arms and arms regulations. And even if a modern-day
12:06:16 17 regulation is not a dead ringer for historical precursors,
12:06:19 18 it still may be analogous enough to pass constitutional
12:06:22 19 muster.

12:06:23 20 What does it mean for a regulation to be
12:06:26 21 analogous enough? So, at Slide 38, we have the explanation
12:06:31 22 from *Bruen*. It's whether the historical regulation is
12:06:35 23 relevantly similar to the modern firearm regulations.

12:06:40 24 What does that mean? It's one layer after
12:06:43 25 another here, but we're getting close to the end of this.

12:06:48 1 Slide 39. We have the explanation from *Bruen*. Again, they
12:06:52 2 say we're not providing an exhaustive survey of everything
12:06:55 3 that would make a regulation relevantly similar, but we do
12:06:59 4 think *Heller* and *McDonald* point towards two metrics. How
12:07:02 5 and why the regulations burden a law-abiding citizen's right
12:07:06 6 to self-defense.

12:07:07 7 So, that's where all the self-defense
12:07:08 8 regulations come in in historical analysis. How and why the
12:07:13 9 regulations burden of law-abiding citizens, a right to
12:07:17 10 self-defense. And that it's a central component --
12:07:19 11 individual self-defense is a central component of the Second
12:07:22 12 Amendment right.

12:07:23 13 So, we go to Slide 40. And the Supreme Court
12:07:26 14 says that the central considerations engaging in the
12:07:31 15 analogical inquiry are: One, whether modern and historical
12:07:35 16 regulations impose a comparable burden on the right of armed
12:07:39 17 self-defense; and two, whether that burden is comparably
12:07:44 18 justified.

12:07:44 19 That's what it says the historical analysis is.
12:07:48 20 And that is why in the *Heller* decision, Justice Alito's
12:07:54 21 majority opinion emphasized that quintessential self-defense
12:07:57 22 weapons have strong protections while "weapons most useful
12:08:02 23 in military service M16s and the like may be banned."

12:08:08 24 So, that's the Second Amendment framework we're
12:08:12 25 applying. I'd like to turn now to applying it based on the

12:08:17 1 really un rebutted factual record on this motion that
12:08:20 2 Mr. Ross touched on and which is in our papers and in our
12:08:23 3 expert declarations.

12:08:24 4 All right. So, Mr. Ross explained why LCMs are
12:08:31 5 not even arms. Assault weapons and LCMs, if you were to
12:08:37 6 consider them under this framework, are not in common use
12:08:41 7 for self-defense. They're not quintessential self-defense
12:08:44 8 weapons. They're weapons that are most useful in military
12:08:47 9 service. Those are the kinds of things that the Supreme
12:08:50 10 Court has said may be banned.

12:08:52 11 And whether you take common use or
12:08:54 12 self-defense -- which I do strongly submit is what the
12:08:57 13 Supreme Court in both *Bruen* and *Heller* is talking about as a
12:09:01 14 preexisting right -- but whether you take common use for
12:09:03 15 self-defense or just common use for lawful purposes, the
12:09:06 16 undisputed record on this motion is enough to show that
12:09:09 17 assault weapons are not in common use.

12:09:14 18 We've heard about numbers today. Even using the
12:09:16 19 10-million figure that Mr. Lehman gave out, of the more than
12:09:21 20 470 million guns in the United States, Your Honor said that
12:09:25 21 comes out to somewhere in the ball park of 2.5 percent.
12:09:28 22 2.5 percent --

12:09:29 23 THE COURT: That number is 470 million now?

12:09:31 24 MR. MORITZ: So, yes, that is -- I believe it's
12:09:36 25 Footnote 14 of our opposition brief.

12:09:38 1 THE COURT: Okay.

12:09:39 2 MR. MORITZ: It cites to sources for that. It
12:09:41 3 might be higher since it's been a few weeks since we filed
12:09:44 4 that, but that's what we put in there. And we provided
12:09:47 5 record support for that.

12:09:51 6 THE COURT: All right.

12:09:52 7 MR. MORITZ: 2.5 percent is not common, let
12:09:54 8 alone in common use for self-defense. And so, the Second
12:09:57 9 Amendment challenge, as you indicated, can end there.

12:10:00 10 THE COURT: Well, so what number would be in
12:10:03 11 common use?

12:10:04 12 MR. MORITZ: That's something that is, I think,
12:10:07 13 developing. I don't have the exact number, but it's not
12:10:11 14 2.5 percent. When you're talking about handguns, something
12:10:14 15 that the Supreme Court described as, you know, the most
12:10:16 16 popular self-defense weapon, and that was something --
12:10:19 17 clearly, that's enough.

12:10:22 18 THE COURT: It was undisputed in their case.

12:10:23 19 MR. MORITZ: Right. We're not anywhere near
12:10:26 20 that. And --

12:10:28 21 THE COURT: But so, could the State sort of
12:10:35 22 piecemeal this? We'll ban a MAC-10 in this piece of
12:10:39 23 legislation. Wait a few weeks and ban an AR-15 and so
12:10:46 24 forth. And, you know, the more specific you make it, it's
12:10:51 25 not going to be in common use. You've got -- so, I don't

12:11:02 1 know. How should you deal with that?

12:11:05 2 I mean, there's, what, 38 categories, 44
12:11:08 3 categories of assault weapons that are banned in the State's
12:11:12 4 legislation. Presumably any one of them is not actually in
12:11:16 5 common use. Maybe all of them together are in common use.

12:11:19 6 MR. MORITZ: Well, I don't think they are. And,
12:11:22 7 certainly, there's certainly no evidence of that. But I
12:11:25 8 don't see why there couldn't be a challenge to a suite of
12:11:28 9 regulations if the State did one regulation, regulation two,
12:11:32 10 regulation three. And after 20 years, there are no guns of
12:11:34 11 any kind that could be used for self-defense anymore, could
12:11:37 12 there be a challenge brought to the overarching military
12:11:40 13 regime based on the Second Amendment? I'm sure there could.

12:11:42 14 And so, I think there's a response to that
12:11:44 15 problem, which isn't at all this case. I don't think the
12:11:47 16 State has tried to, you know, go after one particular model.
12:11:52 17 It's a pretty robust list, and it's -- and so, that's what
12:11:57 18 we have here.

12:11:58 19 History. So, even if the Court finds that
12:12:03 20 Plaintiffs have succeeded in establishing the Second
12:12:07 21 Amendment presumptively covering the regulations, which we
12:12:09 22 submit they do not, Defendants, nonetheless, have met their
12:12:13 23 burden, basically, met it without any rebuttal, to prove
12:12:18 24 that the regulations are part of our nation's historical
12:12:22 25 tradition of weapons regulation, at least for purposes of

12:12:25 1 today's motion. To try to get out of the analogy inquiry
12:12:32 2 that *Bruen* mandates for recently emerging weapons
12:12:35 3 technologies, Plaintiffs make a claim that really these
12:12:39 4 technologies are not unusual, even going back to the
12:12:43 5 founding.

12:12:44 6 So, take a look at Slide 41, and this is from
12:12:49 7 the DSSA Plaintiffs' brief, Footnote 6. And they make the
12:12:53 8 claim that ammunition magazines capable of holding more than
12:12:57 9 17 rounds have been around -- have been in common use for
12:13:02 10 centuries. And the only evidence Plaintiffs provide for
12:13:05 11 this is the report of this lone Girandoni air rifle taken on
12:13:10 12 the Lewis & Clark Expedition.

12:13:12 13 But we looked at the book that they cite, and
12:13:14 14 here's what their own source says on Slide 42 about that.
12:13:18 15 It says that the Girandoni air rifle Merriweather Lewis had
12:13:22 16 was a type of rifle that Austrian soldiers used during the
12:13:28 17 Napoleonic Wars. That Napoleon, not an activist, I'm pretty
12:13:29 18 sure, thought that those were the kinds of weapons of
12:13:32 19 assassins. No one knows how Lewis got it. There's no other
12:13:36 20 good evidence for Girandoni-style air rifles having made it
12:13:38 21 to the United States during that era. That the one air
12:13:42 22 rifle was being used to impress tribes on the expedition.
12:13:47 23 And even in 1845 when it was auctioned at an estate sale, it
12:13:53 24 was described then as a great curiosity.

12:13:56 25 We pointed this out at Footnote 1 of our

12:13:59 1 opposition. Plaintiffs don't respond to it. They continue
12:14:02 2 to claim in their reply brief.

12:14:04 3 There are ample examples of large-capacity
12:14:06 4 magazines in critical moments of the nation's history. But
12:14:08 5 the only thing they cite is this Merriweather Lewis
12:14:11 6 Girandoni air rifle. It's just not supported even by their
12:14:15 7 own source.

12:14:16 8 Defendants have submitted an unrebutted expert
12:14:19 9 affidavit from Professor Kevin Sweeney. We have this at
12:14:22 10 Slide 43. He is a professor of history emeritus at Amherst.

12:14:29 11 THE COURT: One thing that I noticed, looking at
12:14:31 12 some of these declarations, is that many of the experts that
12:14:39 13 you all have are presumably filing more or less similar
12:14:45 14 declarations in most of the other litigation that's going on
12:14:48 15 on this topic; is that right?

12:14:50 16 MR. MORITZ: They are filed in some other cases.
12:14:52 17 I think that's generally correct.

12:14:55 18 THE COURT: I mean, I take it the states that
12:14:58 19 have passed the legislation are sort of working together to
12:15:06 20 sustain the legislation; is that right?

12:15:09 21 MR. MORITZ: As you probably know, Attorney
12:15:11 22 Generals offices at the state level around the country
12:15:13 23 coordinate on various issues, and there is some of that
12:15:16 24 going on.

12:15:16 25 THE COURT: All right.

12:15:18 1 MR. MORITZ: Okay. So, Professor Sweeney is a
12:15:22 2 very eminent historical professor specializing in material
12:15:25 3 culture in the 1700s and the founding era. And he goes
12:15:31 4 into -- this is Slide 44 -- how common were repeating
12:15:36 5 firearms in the 18th Century in the United States.
12:15:38 6 Extraordinarily rare. And many did not even have contextual
12:15:45 7 magazines.

12:15:47 8 Giradoni's air rifle was a curiosity, just like
12:15:49 9 Plaintiffs' own source says. We don't offer this un rebutted
12:15:52 10 evidence to claim that the Second Amendment only protects
12:15:55 11 weapons coming at the time of the founding. That is not our
12:15:58 12 argument.

12:15:59 13 We're just offering this to show that assault
12:16:02 14 weapons and LCMs are a new technology. They're a new issue
12:16:06 15 that's come out in the 20th Century. They're being dealt
12:16:09 16 with in modern times. They're not something from the
12:16:12 17 founding, and that puts us in the analogy inquiry under
12:16:15 18 *Bruen*.

12:16:16 19 So, let's go to the analogy.

12:16:17 20 THE COURT: Well, in terms of a new
12:16:19 21 technology --

12:16:20 22 MR. MORITZ: Mm-hmm.

12:16:21 23 THE COURT: -- whether it's new or my favorite,
12:16:28 24 patentable sense, that's one thing. But it also occurs to
12:16:32 25 me that why would -- you know, most legislatures try to

12:16:44 1 legislate about things that are perceived to be problems.

12:16:46 2 MR. MORITZ: Right.

12:16:47 3 THE COURT: And there's doesn't seem to be any
12:16:55 4 evidence in the record that whatever the amount of repeating
12:17:03 5 firearms that there were in the 19th Century were leading to
12:17:12 6 anything like the problems that the legislature seems to
12:17:16 7 have been trying to address in the law.

12:17:21 8 So, I guess the question or it seems to me like
12:17:26 9 if we're getting to this point, you have to consider both
12:17:29 10 things. And that's presumably the reason why you're talking
12:17:32 11 about Bowie knives is that was perceived to be a problem.

12:17:34 12 MR. MORITZ: Right. The Bowie knife craze, as
12:17:39 13 Professor Spitzer called it at Paragraph 22, that was an
12:17:41 14 issue in the 1830s, and in that time period we're dealing
12:17:46 15 with another one. It's -- you know, we're in the social
12:17:49 16 concern that wasn't an issue in the 1800s that we have
12:17:53 17 today, but you have to look for analogs to it.

12:17:55 18 And so, if we go to Slide 45, we have Professor
12:18:01 19 Robert Spitzer. He is someone who's devoted his career to
12:18:08 20 studying gun regulation, writing books and articles about
12:18:10 21 it. I'm not going to go over his CV, but to summarize some
12:18:16 22 of his evidence, Slide 46 -- and I can tell Your Honor has
12:18:21 23 spent some time with his declaration -- but he goes through
12:18:26 24 the historical tradition of weapons regulation in the United
12:18:30 25 States. He talks about in this 1830s forward through the

12:18:33 1 1800s time period, Bowie knives and similar fighting knives.

12:18:38 2 Go back to the prior slide, please. The Bowie
12:18:40 3 knives and fighting knives were heavily regulated in that
12:18:43 4 area.

12:18:43 5 And to touch on the question Your Honor asked --
12:18:45 6 THE COURT: I'm sorry, Mr. Moritz. Do you think
12:18:47 7 it makes any difference to your argument that most of the
12:18:53 8 things you're citing, all of the things, almost all the
12:18:56 9 things that are up here are mostly not firearms?

12:19:01 10 MR. MORITZ: I don't think so. I think that the
12:19:08 11 weapons regulation, the problems that society were dealing
12:19:11 12 with are -- and we're going to get to some 20th Century
12:19:15 13 firearms --

12:19:15 14 THE COURT: But this is pretty much -- haven't
12:19:18 15 they said the 20th Century is irrelevant?

12:19:20 16 MR. MORITZ: I don't think that that's quite
12:19:22 17 right, because they said that if the later regulation is
12:19:26 18 inconsistent with this historical tradition, then it's
12:19:30 19 irrelevant. But if it's part of -- it doesn't say that if
12:19:33 20 it's part of a pattern. And machine gun regulations,
12:19:37 21 sawed-off shotgun regulation that -- I don't think there's
12:19:40 22 any question that that's acceptable.

12:19:44 23 Scalia said that would be startling to suggest
12:19:46 24 that the Second Amendment would protect those kinds of
12:19:49 25 items. So, I think that the well-accepted 20th Century

12:19:54 1 firearms regulation are just part of the historical
12:19:57 2 tradition that goes back to Bowie knives.

12:19:59 3 And so, to go to one of Your Honor's questions
12:20:03 4 from earlier, Bowie knives, as Professor Spitzer says, there
12:20:07 5 was this craze for Bowie knives, and they were associated
12:20:12 6 with problems. They were viewed as something that were
12:20:14 7 being used in dueling, in criminal activity, but they were
12:20:21 8 proliferating. There was a craze for them. Lots of people,
12:20:24 9 you know, were acquiring them or making them.

12:20:28 10 Blunt weapons. We talked about that. Very
12:20:30 11 extensive regulation of bludgeons, billy clubs, slungshots,
12:20:34 12 et cetera, and we go on with other regulations.

12:20:38 13 Now, let's go to the next slide, Slide 47. So,
12:20:45 14 in the mid-1920s to mid-1930s, there's this round of State
12:20:52 15 machine gun regulation followed by the Federal National
12:20:57 16 Firearms Act in 1934, which at that time imposed a tax on
12:21:01 17 machine guns and sawed-off shotguns.

12:21:05 18 And then in 1986, the Gun Control Act at the
12:21:10 19 federal level made it unlawful to possess a machine gun with
12:21:14 20 some grandfathering and other exceptions. And Professor
12:21:18 21 Spitzer -- everyone agrees, Supreme Court, Justice Scalia,
12:21:21 22 the Plaintiffs' counsel here today, we all agree those
12:21:23 23 machine gun regulations are not a Second Amendment problem.
12:21:28 24 They're well within the nation's historical tradition.

12:21:32 25 Just to touch on one thing you asked about, I

1 thought it was interesting, because there's a claim that
2 Tommy guns were -- you know, like people were running wild
3 with them in terms of using them for criminality. But what
4 Professor Spitzer actually says at Paragraph 52 of his
5 declaration is that, Although guns like the Tommy gun and
6 the BAR, which is another machine gun, were actually used
7 relatively infrequently by criminals, when they were used,
8 they exacted a devastating toll and garnered national
9 attention, such as the Valentine's Day Massacre, which was a
10 very notorious and horrific piece of the Tommy gun.

11 THE COURT: Yeah, I remember that one.

12 MR. MORITZ: So, the machine gun problem was one
13 that it was a concern because when it happened, when they
14 were used by criminals, it was really, really bad, but not
15 that they were being used constantly or anything like that.
16 It was -- that's the actual record on Tommy guns.

17 All right. Slide 48, I'm going to try to get
18 through this quickly, so I can hand off to Mr. Ross. We've
19 got a table of magazine restrictions in the 1917 to 1934
20 time period. It represented more than 50 percent of the
21 population at the time, almost half of the states.

22 These 20th Century regulations, including the
23 machine gun restrictions -- so, they weren't a departure
24 from our nation's history. And I've talked about the fact
25 that it's accepted.

12:23:05 1 So, there's a lot more covered in Professor
12:23:10 2 Spitzer that I'll get to today, but I won't -- in the
12:23:13 3 interest of time, I'll move past it. But Professor
12:23:17 4 Spitzer -- we can go to Slide 49 -- talks about a pattern
12:23:20 5 that throughout American history, both firearms and other
12:23:26 6 dangerous weapons, were subject to, you know, a wide range
12:23:31 7 of regulations.

12:23:32 8 And there was a process. They have to enter
12:23:36 9 society. They have to proliferate. There has to be
12:23:38 10 violence and concerns from society, and then they get
12:23:41 11 regulated. And if we go to Paragraph 50, he specifically
12:23:46 12 talks about how gun technologies emerge in the military
12:23:50 13 context, come over to the civilian context and eventually
12:23:54 14 are regulated.

12:23:55 15 And so, what we have here are assault weapons.
12:24:01 16 We have military technology. World War II. The German
12:24:06 17 emergence of that, really in the United States. The testing
12:24:09 18 we saw in the M16, AR-15 in Vietnam. This is something
12:24:13 19 that's happening in the late 20th Century and within a
12:24:16 20 decade or two of assault weapons starting to move from their
12:24:19 21 military origin into civilian hands. States start to ban
12:24:24 22 them.

12:24:24 23 The Federal Government bans them from 1994 to
12:24:27 24 2004 and also bans what was defined by the Federal
12:24:31 25 Government at that time as large-capacity magazines, which

12:24:34 1 was just a ten-round cutoff, not a 17-round cutoff. That
12:24:38 2 federal assault weapons ban from 1994 to 2004 was not an
12:24:43 3 outlier. It's right within the tradition of restricting or
12:24:47 4 prohibiting weapons viewed as particularly problematic that
12:24:51 5 runs throughout our historical tradition, and that flows
12:24:54 6 from the unrebutted historical evidence we presented on this
12:24:56 7 motion.

12:24:57 8 And Professor Spitzer bolsters this. That's at
12:25:01 9 Slide 51. I'm not going to put that up, but that's the
12:25:05 10 conclusion that we've reached, and we've submitted to you.
12:25:08 11 And it's a conclusion that Professor Spitzer, a serious
12:25:11 12 scholar in the history of American gun regulation, has
12:25:14 13 reached. And it's unrebutted, and the Plaintiffs made the
12:25:16 14 choice not to put in any contrary evidence.

12:25:20 15 So, looking at the considerations that *Bruen*
12:25:24 16 identifies as central for determining whether historical
12:25:27 17 regulations by analogy are relevantly similar, let's go to
12:25:34 18 Slide 52. The things that *Bruen* says are central in the
12:25:38 19 analogy inquiry are whether modern and historical
12:25:41 20 regulations impose a comparable burden on the right of armed
12:25:44 21 self-defense and whether that burden is comparably
12:25:48 22 justified. *Bruen* at 2133.

12:25:50 23 On the first of these considerations, we made
12:25:53 24 the record to show that the regulations place little burden
12:25:56 25 on armed self-defense because the unrebutted expert record

12:26:00 1 here establishes that assault weapons and LCMs are not well
12:26:04 2 suited for self-defense.

12:26:06 3 And on the second consideration, any limited
12:26:09 4 burden on self-defense is comparably justified because the
12:26:13 5 quintessential self-defense weapon, handguns, are
12:26:16 6 unaffected. As Justice Scalia wrote in *Heller*, weapons most
12:26:19 7 useful in military service may be banned. M16s and the like
12:26:23 8 may be banned.

12:26:23 9 Assault weapons, they're like M16s. Assault
12:26:28 10 weapons are most useful in military service. Relevantly
12:26:32 11 similar, assault weapons regulations, relatively similar to
12:26:36 12 the regulation of machine guns and to Bowie knives, with the
12:26:41 13 social concerns of the 1830s. Restricting assault weapons
12:26:44 14 comports with our nation's historical tradition of weapons
12:26:48 15 regulation.

12:26:48 16 On this motion, we've made that record. And
12:26:51 17 although they are not even arms, if they were to be
12:26:54 18 considered arms, the same holds for large-capacity
12:26:58 19 magazines. Plaintiffs have not shown a likelihood of
12:27:00 20 success on their Second Amendment challenge.

12:27:02 21 I'm glad to answer any questions on this piece.

12:27:05 22 THE COURT: I do have right this minute just one
12:27:11 23 question, which is during the time when the Federal
12:27:14 24 Government banned assault weapons from 1994 to 2004 -- so I
12:27:19 25 understand from something I read somewhere that that

12:27:24 1 legislation was sunsetted after ten years. But was there
12:27:32 2 litigation as to whether or not that violated the Second
12:27:35 3 Amendment?

12:27:35 4 MR. MORITZ: It's interesting, Your Honor. I
12:27:37 5 haven't done a comprehensive study of that, but I would
12:27:40 6 think if there was some really meaningful litigation over
12:27:43 7 that, it would have come up in our research. I think the
12:27:45 8 fact that, you know, Congress was able to pass that
12:27:49 9 legislation and it existed for ten years, it's pretty
12:27:53 10 telling as far as, you know, what is our historical
12:27:58 11 tradition and whether what was happening now is really true
12:28:00 12 to the historical tradition as opposed to sort of a modern
12:28:05 13 development in how people think about weapons regulation.

12:28:08 14 THE COURT: I mean, it's a question that occurs
12:28:10 15 to me, but I'm not sure in the end whether it would have any
12:28:16 16 impact on the Supreme Court's analysis because essentially
12:28:23 17 what happens in the -- once you get past reconstruction,
12:28:30 18 what happens doesn't inform any relevant understanding of
12:28:38 19 what's covered or not covered by the Second Amendment right.

12:28:40 20 MR. MORITZ: I don't think that's correct. I
12:28:41 21 think that's too strong. I would say the following: I
12:28:44 22 would say the most relevant is that the Bill of Rights and
12:28:49 23 1868 time period, no question. And the things that are
12:28:52 24 immediately around that era, those are the most relevant.
12:28:55 25 But the Supreme Court doesn't say throw the rest of American

12:28:58 1 history out. It's useless. It actually says
12:29:01 2 post-enactment, subsequent history can be very relevant for
12:29:05 3 interpreting the widely-held understanding.

12:29:08 4 What it says, what *Bruen* says is, when
12:29:10 5 inconsistent with the 20th Century or late 19 -- I think
12:29:13 6 it's late 19th Century -- when late 19th Century
12:29:16 7 regulations, there was a spade of regulations of pistols or
12:29:19 8 something like that. When they were inconsistent with the
12:29:25 9 history of weapons regulation, don't pay attention to those.
12:29:29 10 But if it's -- it doesn't say when it's consistent, when it
12:29:32 11 fits the pattern.

12:29:33 12 THE COURT: But, I mean, you know, part of the
12:29:57 13 inconsistency in *Bruen* for the New York legislation is what
12:30:04 14 it was inconsistent with was an absence of earlier
12:30:10 15 legislation; right? What was it inconsistent with?

12:30:15 16 MR. MORITZ: Because it -- so, what it was
12:30:17 17 inconsistent with is that it was putting almost absolute
12:30:23 18 burden on the most popular form of self-defense today in
12:30:28 19 terms of, you know, handguns. And so, that, again, looking
12:30:33 20 at the core, what's the analysis *Bruen* says to do in
12:30:37 21 historical analysis? What's the burden on self-defense, on
12:30:40 22 the ability to self defend in the analogical inquiry?

12:30:44 23 And they go through that. And they say this is
12:30:45 24 a huge burden, saying people basically can't have -- you
12:30:48 25 know, putting a very, very restrictive may issue a

12:30:53 1 permitting regime on handguns, is the burden of self-defense
12:30:58 2 too much?

12:30:59 3 THE COURT: The way the Supreme Court was
12:31:01 4 looking at it was, you know, it's the State's burden. And
12:31:07 5 so, you basically can't come up with anything that supports
12:31:14 6 it.

12:31:20 7 And here, you've got -- going back to the
12:31:24 8 National Firearms Act or whatever it's called in 1994, your
12:31:37 9 argument is actually the earlier legislation dealt with
12:31:43 10 various other kinds of arms, mostly other arms. And there
12:31:48 11 was a lot of regulation, shall we say, at the margins. And
12:31:56 12 so, this is consistent with that. So, maybe it doesn't
12:32:00 13 carry much weight, but it carries a little bit of weight?

12:32:03 14 MR. MORITZ: I think that's pretty close, but I
12:32:05 15 would say the following, which is machine guns and then
12:32:11 16 later in the late 20th Century, assault weapons. You can't
12:32:15 17 look to the 1800s and say, ah-ha, like that same weapon was
12:32:20 18 dealt with. You have to proceed by analogy.

12:32:23 19 So, the more important things are in the 1800s.
12:32:26 20 But how those traditions continued to be applied in the
12:32:31 21 1930s or in the 1960s, that's relevant. And they were
12:32:35 22 consistent.

12:32:35 23 THE COURT: And actually I think you just said
12:32:37 24 something which I hadn't really thought about which is so
12:32:40 25 regulation of machine guns and sawed-off shotguns, which we

12:32:49 1 seem to agree is constitutional, then that becomes part of
12:33:04 2 the tradition of relevantly similar, or if it is relevantly
12:33:10 3 similar, but it's something that can be considered for
12:33:13 4 relevantly similar litigation or regulation, I mean.
12:33:22 5 Because even if it's not exactly in the right time frame,
12:33:25 6 you know, it's kind of like the transitive law. You know,
12:33:28 7 that's valid, so there must be something earlier that makes
12:33:32 8 it valid. And so, even though -- even to the extent that we
12:33:36 9 can't necessarily identify what that is, because I don't
12:33:38 10 think in the Supreme Court case, which I haven't read, but I
12:33:43 11 don't think in the Supreme Court case they were probably
12:33:45 12 talking about Bowie knives. It's a reflection of something
12:33:53 13 that you're now trying to get a reflection on something kind
12:33:58 14 of analogous.

12:33:59 15 MR. MORITZ: I think that that is a fair way to
12:34:02 16 look at it, Your Honor, that, you know, it's not like you
12:34:05 17 just ignore these things that we recognize are valid
12:34:08 18 regulations. They're part of the picture, too.

12:34:11 19 THE COURT: Yeah. Well, so, I mean, that's part
12:34:14 20 of what I've been trying to think about over the last week
12:34:21 21 or so when I've been thinking about this was how, if at all,
12:34:29 22 to integrate machine guns and sawed-off shotguns which, to
12:34:36 23 some extent, seemed more relevant to me than Bowie knives or
12:34:42 24 at least more understandable. How they fit, how they
12:34:50 25 would -- you know, it would seem to me wrong, as a practical

12:35:00 1 matter, to only take what the Supreme Court could -- to take
12:35:06 2 what the Supreme Court says about the method of analysis and
12:35:08 3 not consider things that are apparently consistent with that
12:35:13 4 method of analysis, like machine guns and sawed-off
12:35:18 5 shotguns.

12:35:18 6 MR. MORITZ: Look, I think you're wrestling with
12:35:21 7 what we've been working through as well, and our conclusion
12:35:23 8 is that it is consistent with that. The only, you know,
12:35:26 9 slight amendment I think I would add is that although Bowie
12:35:31 10 knives might seem very -- you said like you don't think it's
12:35:34 11 quite as relevant because Bowie knives are -- you know, I
12:35:37 12 mean, the thing that jumps out is that they're so much less
12:35:40 13 dangerous than an assault weapon.

12:35:42 14 I think that that actually is helpful for us,
12:35:45 15 that people in the 1830s and the states that were
12:35:50 16 restricting -- you know, it's a broad swath of the United
12:35:56 17 States. If they could put those types of sweeping
12:35:59 18 restrictions on Bowie knives in the 1830s, assault weapons,
12:36:03 19 given the issues they have, I think, is a foreshadow of that
12:36:08 20 historical tradition.

12:36:10 21 THE COURT: If you have this number on the top
12:36:12 22 of your head, how many states put restrictions on Bowie
12:36:16 23 knives in the 1830s?

12:36:18 24 MR. MORITZ: I believe it was -- oh, in the
12:36:20 25 1830s?

12:36:20 1 THE COURT: Or in that general.

12:36:21 2 MR. MORITZ: Yeah.

12:36:22 3 THE COURT: I assume the Bowie knife craze ended
12:36:25 4 after a few years, after a decade or two.

12:36:27 5 MR. MORITZ: Yeah. So, I believe in the end it
12:36:29 6 was north of 40 states, but it took several decades. It
12:36:32 7 went on --

12:36:32 8 THE COURT: I mean, because there weren't even
12:36:33 9 40 states in the 1830's.

12:36:35 10 MR. MORITZ: Exactly. Exactly. But in the
12:36:37 11 1830s, you know, this is --

12:36:41 12 THE COURT: But, you know, sorry to keep
12:36:44 13 interrupting, Mr. Moritz, but basically you'd say almost
12:36:49 14 every state that could passed a Bowie knife law?

12:36:54 15 MR. MORITZ: An awful lot. Let me just -- if
12:36:56 16 you just bear with me one moment. If you go to Exhibit C to
12:37:01 17 Spitzer's declaration.

12:37:02 18 THE COURT: Yeah. I don't have the exhibits
12:37:03 19 with me.

12:37:04 20 MR. MORITZ: Can we bring that up perhaps?
12:37:06 21 Spitzer's declaration, Exhibit C. That's a chart that's
12:37:09 22 pretty handy. And it has a table of regulations by state
12:37:12 23 and it gives the year.

12:37:20 24 Exhibit C. Exhibit C. While we're bringing
12:37:28 25 that up, it goes through the states, and it lists by the

12:37:31 1 year of the regulation. And I mean, almost every column --
12:37:38 2 and I have a clean printout. I could hand it up if that's
12:37:41 3 useful.

12:37:42 4 THE COURT: All right. I'd be interested in
12:37:44 5 seeing it.

12:37:45 6 MR. MORITZ: Oh, here we go. May I approach?

12:37:48 7 THE COURT: I can -- sure. Why don't you
12:37:52 8 just --

12:37:52 9 MR. MORITZ: Any way, you get the picture. The
12:37:55 10 column that says Bowie knives far left.

12:37:58 11 THE COURT: I think I did see this somewhere.
12:38:00 12 Maybe it was --

12:38:03 13 MR. MORITZ: And, yeah, as you'll see, it's
12:38:06 14 right in that sweet spot. The 1830s, the
12:38:09 15 post-reconstruction era. 1860s. 1870s.

12:38:12 16 THE COURT: I see Alaska was busy enacting
12:38:15 17 something 50-odd years before it was a state. I guess
12:38:19 18 territorial legislature or something.

12:38:24 19 All right. Well, that's -- okay. All right.

12:38:30 20 So, Mr. Moritz, I think we need to finish with
12:38:34 21 you here.

12:38:36 22 Mr. Ross, if you're going to talk to me about
12:38:38 23 the Delaware Supreme Court, let's skip that. Okay?

12:38:42 24 MR. ROSS: Okay.

12:38:42 25 THE COURT: And were you going to talk about

12:38:44 1 something else?

12:38:44 2 MR. ROSS: Only one thing in response to Your
12:38:46 3 Honor's question about how the legislature -- how an issue
12:38:50 4 arises and that's what cause a legislature to act. The only
12:38:54 5 thing I would point Your Honor to is to the declaration of
12:38:56 6 Ms. Allen at Exhibit C. She has a list of firearms and
12:39:01 7 public mass shootings. And what you see is that in the
12:39:04 8 first 14 -- first five years between 1982 and about 1987,
12:39:10 9 there are 14. There's one, just one in 1985 and one in
12:39:14 10 1986. In the final 22 months, there are 15. And you have
12:39:19 11 to go back more than 20 years to find another year looking
12:39:23 12 backwards where there was just one.

12:39:26 13 So, apropos of Your Honor's point of what
12:39:29 14 legislatures do is they see issues and they react to them.
12:39:32 15 That's exactly what happened here.

12:39:33 16 THE COURT: Yeah. I mean, it's probably
12:39:37 17 irrelevant to the -- not irrelevant, but not very
12:39:43 18 significant to the Second Amendment question, but it seems,
12:39:51 19 you know, the recitation of events at the beginning of HB
12:39:57 20 450, it makes it pretty clear what legislature was reacting
12:40:01 21 to; right?

12:40:01 22 MR. ROSS: It does, and it is consistent, and
12:40:04 23 I'm not going to go back to what Mr. Moritz talked about --
12:40:06 24 where technologies emerge. And we're talking about, you
12:40:09 25 know, assault weapons post-Vietnam. The issue increases.

12:40:13 1 Public mass shootings. Legislatures responded. It's
12:40:17 2 consistent with the historical legislation.

12:40:22 3 Thank you, Your Honor.

12:40:22 4 THE COURT: Unless you're really burning to tell
12:40:25 5 me something.

12:40:27 6 MR. LEHMAN: I'm really burning to tell you
12:40:29 7 perhaps one thing.

12:40:30 8 THE COURT: All right. Come on and do it then.

12:40:33 9 MR. LEHMAN: I was supposed to start judging a
12:40:35 10 high school mock trial competition over at the State
12:40:37 11 courthouse ten minutes ago, so I'm going to have to let them
12:40:39 12 know I'm late. But there was one thing that came up, Your
12:40:42 13 Honor, during your discussion with Mr. Moritz about --
12:40:47 14 first, I think you were correct. I think if you look back
12:40:49 15 through *Bruen* -- I don't have the page for you. I could
12:40:51 16 certainly find it and let you know about it later, but --

12:40:54 17 THE COURT: No.

12:40:55 18 MR. LEHMAN: -- I'm fairly confident they said
12:40:58 19 forget about the 20th Century in the context of these
12:41:00 20 discussions. And I'll tell you why is because you asked
12:41:02 21 what was inconsistent with the New York situation. And what
12:41:07 22 was inconsistent with the history in the New York situation
12:41:10 23 was it was inconsistent with the tradition of banning
12:41:14 24 dangerous and unusual arms.

12:41:15 25 And so, when you look back and you say, okay,

12:41:18 1 well, there are also these sawed-off shotgun regulations and
12:41:22 2 machine gun regulations in the 20th Century, the idea under
12:41:25 3 *Bruen*, particularly because the Court essentially said you
12:41:28 4 can disregard the 20th Century, is not to look back and say,
12:41:31 5 well, now those are part of the tradition. What is the
12:41:34 6 tradition is only banning dangerous and unusual arms. Those
12:41:37 7 are dangerous and unusual. They were not in common use for
12:41:40 8 lawful purposes at the time. They're still not.

12:41:43 9 The arms that are at issue here are in common
12:41:46 10 use for lawful purposes. And the only other thing would be
12:41:50 11 just to remind the Court that the law is -- the case law is
12:41:52 12 very clear, that the question is about common use for lawful
12:41:55 13 purposes. I think probably consciously the State has
12:41:58 14 repeated self-defense hundreds of times, but you can have
12:42:01 15 other --

12:42:01 16 THE COURT: That's the last word from *Bruen*,
12:42:04 17 right. They repeated it, not a hundred times, but more than
12:42:08 18 ten times.

12:42:09 19 MR. LEHMAN: Right. Well, as I explained
12:42:10 20 earlier, Your Honor, naturally in that case that was the
12:42:12 21 focus because it was concealed to carry handguns. But in
12:42:16 22 several other Supreme Court decisions and various Circuit
12:42:19 23 Court decisions, it's been made very clear that other
12:42:20 24 purposes are absolutely lawful, recreation, hunting, you
12:42:24 25 know.

12:42:24 1 THE COURT: And I can understand why -- I'm
12:42:27 2 going to have to think about it, but I can understand why
12:42:29 3 you say that because, yes, you don't go hunting with
12:42:33 4 carrying a concealed weapon so you can sneak up on the deer.
12:42:36 5 So, what you say is, and I don't mean any criticism by this,
12:42:42 6 it's perfectly plausible. It's one of those things you have
12:42:48 7 to spend some time, more time studying these things.

12:42:50 8 And, of course, I'm not actually at this
12:42:54 9 point -- you know, the issue before me is not to come to a
12:42:58 10 final decision on any of this. It's to, you know, judge the
12:43:01 11 likelihood of success or probability of success on the
12:43:06 12 merits which indicates a certain -- so, it's a different
12:43:15 13 determination.

12:43:16 14 So, is there anything else you want to say?

12:43:18 15 MR. LEHMAN: I would only say we heard a lot
12:43:19 16 about suitability, Your Honor, which is totally immaterial.

12:43:22 17 THE COURT: Sorry. Did you say --

12:43:24 18 MR. LEHMAN: Suitability.

12:43:25 19 THE COURT: Oh, suitability.

12:43:26 20 MR. LEHMAN: We heard a lot about the
12:43:28 21 suitability of these specific arms for self-defense in the
12:43:31 22 home. It's immaterial, and the Court has made clear that
12:43:35 23 what the people choose is what controls, not what the State
12:43:38 24 thinks they ought to have.

12:43:40 25 And we've also heard that these are weapons most

12:43:44 1 suitable for military purposes, which I think begs the
12:43:47 2 question why they all have military counterparts and aren't
12:43:51 3 actually used by the military.

12:43:52 4 So, with that, Your Honor, I think I would
12:43:55 5 conclude.

12:43:55 6 THE COURT: All right.

12:43:56 7 MR. LEHMAN: I don't know if Mr. Pileggi has
12:43:58 8 anything, but if he does, Your Honor, I would appreciate
12:44:01 9 being excused for a moment.

12:44:03 10 THE COURT: Yes. No, we're going to be done in
12:44:04 11 a minute, one way or another.

12:44:06 12 Do you have anything, Mr. Pileggi?

12:44:07 13 MR. PILEGGI: I promise I will be limited to one
12:44:09 14 minute.

12:44:10 15 THE COURT: Okay. One minute.

12:44:13 16 And, Mr. Lehman, you ought to step out and take
12:44:16 17 care of this because it's important, this what you have --

12:44:20 18 MR. LEHMAN: Thank you, Your Honor.

12:44:21 19 THE COURT: -- to do.

12:44:22 20 MR. PILEGGI: I'll be done before he's out the
12:44:23 21 door, Your Honor.

12:44:24 22 THE COURT: Yeah, he needs a head start.

12:44:26 23 MR. PILEGGI: I just wanted to respond to Your
12:44:29 24 Honor's question when I was at the podium and also something
12:44:32 25 about whether or not armed -- excuse me, whether or not

12:44:36 1 magazines are considered arms. That same Third Circuit
12:44:39 2 decision from 2018 that we referred to --

12:44:41 3 THE COURT: Right.

12:44:42 4 MR. PILEGGI: -- *Association of New Jersey*, they
12:44:44 5 also said, in addition to ammunition, this arms -- excuse
12:44:47 6 me, that magazines are considered arms within the meaning of
12:44:50 7 the Second Amendment.

12:44:51 8 So, I know you asked me that question, and I
12:44:53 9 focused on the ammunition part, but that same decision said
12:44:58 10 that magazines as well within the definition of arms under
12:45:01 11 the Second Amendment.

12:45:02 12 I just wanted to follow up, because it's also
12:45:05 13 rebuttal to what my friend said that we didn't cite to any
12:45:09 14 cases that rebutted the *Ocean State* decision which --

12:45:13 15 THE COURT: So, under that reading, it would
12:45:15 16 still leave the question of whether or not there's a
12:45:18 17 historical tradition of regulation?

12:45:21 18 MR. PILEGGI: And that same decision said there
12:45:22 19 is no historical tradition of regulation of large-capacity
12:45:26 20 magazines. So, that completes the circle, Your Honor.

12:45:31 21 Thank you.

12:45:31 22 THE COURT: Okay. All right. Thank you.

12:45:33 23 All right. Well, thank you for all your time
12:45:35 24 this morning. I am cognizant that I need to get a decision
12:45:44 25 to you, and so I will endeavor to do that. And I don't have

12:45:55 1 a sense right now of what the right balance is between
12:46:08 2 thoroughness and recognizing that this is a preliminary
12:46:11 3 injunction. So, I don't know how long it will take, but I
12:46:14 4 do understand it's significant and important that I get
12:46:18 5 something out so you all can make decisions about what to do
12:46:22 6 next.

12:46:22 7 All right. So thank you. We'll be in recess.

12:46:26 8 (Everybody said, Thank you, Your Honor.)

12:46:27 9 DEPUTY CLERK: All rise.

12:46:28 10 (Court was recessed at 12:46 p.m.)

11 I hereby certify the foregoing is a true and
12 accurate transcript from my stenographic notes in the
13 proceeding.

14 /s/ Heather M. Triozzi
15 Certified Merit and Real-Time Reporter
16 U.S. District Court
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